



REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

COMMERCIAL DIVISION

CIVIL SUIT NO. 410 OF 2002

A.M BAHAJJ & CO. LTD.....PLAINTIFF

VERSUS

KENYA PORTS AUTHORITY.....DEFENDANT

JUDGMENT

1. Through a plaint dated 11th November, 2002 which was filed on the same date, the plaintiff claimed that in November, 1997 a company by the name Shams Impex (Uganda) Ltd imported textiles valued at US\$283,666.66 stuffed into container No. OCLU 1168374 on board motor vessel "N Merwe" which arrived at Mombasa on 27th November, 1997. The plaintiff further claimed that the vessel duly landed at Mombasa and discharged the said container at the Port of Mombasa with the defendant taking custody of the same as a bailee for reward, as it awaited collection of the container by the assignor.

2. The plaintiff also averred in the plaint that in or about November, 1997 Katemba De Internationale imported textiles valued at US\$50,000 stuffed into container No. APMU 2639597 through the Port of Mombasa on board the motor vessel "Maesk Asia Decimo" and the said container was duly landed at Mombasa and discharged into the custody and care of the defendant as bailee for reward.

3. The 2 containers are said to have been stolen and/or got lost when they were in the custody of the defendant, which breached its duty of care of safely storing the containers and their contents. The plaintiff prays for judgment against the defendant for US\$440,439.00 made up of the cost of the textiles in the two containers at US\$333,666.66 and interest thereon at 12% from February 2000 to the date of filing of the suit on 11th November, 2002 at US\$106,773.00, further interest at court rates from the date of filing the suit and costs.

4. The defendant denied the claim and on 17th December, 2002 filed a statement of defence dated 16th December, 2002. The defendant admitted that the motor vessel "N Merwe" (Ned Merwe) arrived at the Port of Mombasa on or about the 27th November, 1997 but denied that container No. OCLU 1168374 was ever landed and deposited in its custody. The defendant therefore denied owing the plaintiff a duty of care for the said container.

5. The defendant admitted that motor vessel "Maersk Asia Decimo" arrived on or about the 5th of November, 1997 but denied that it owed the plaintiff any duty of care for container No. APMU 2639597. In the alternative, the defendant averred that if the said container was discharged into its possession then the same was delivered to the consignee and/or its authorized agent while in good order and condition as landed upon completion of the port and customs formalities. The defendant further averred that if it was liable for the loss of the container No. APMU 2639597, which it denied, then it was limited to the value of the consignment declared at the Port of Mombasa.

6. In its statement of defence, the defendant reserved the right to raise a preliminary objection that this suit is bad in law for having been filed outside the limitation period provided for in the Kenya Ports Authority Act Cap 391 Laws of Kenya.

7. The plaintiff on 31st January, 2003 filed a reply to the defence. It denied that container No. APMU 2639597 was discharged into possession of the consignee or the consignee's authorized agents and put the defendant to strict proof thereof. The plaintiff also denied having declared the value of the said container to the defendant.

8. By consent, the defendant's documents filed on the 9th December 2013 were marked as defendant exhibit 1 and by a further consent the defendant's supplementary list of documents filed on the 24th June 2014 was marked as defence exhibit No. 2.

The plaintiff's case

9. The Plaintiff called one witness, by the name of **Abdo Mohamed Bahaji** as per his identity card which he showed to the court during cross-examination. In the court proceedings his name was recorded as Abdul Mohamed Bahajji. He testified as PW1. He adopted his witness

statement filed in court. He also produced all the documents filed in court on behalf of the plaintiff as exhibits. He testified that he was the Managing Director and the main shareholder of the plaintiff company. He stated that on the 16th October 1997 he received a court order issued by Hon. Muchelule, Chief Magistrate (as he then was) restricting him from doing anything in the plaintiff company. PW1 gave evidence that his properties, including his briefcase were carted away by Auctioneers following a misunderstanding with his co-directors in the plaintiff company. He reported the matter to Central Police Station where he was issued with a police abstract. The court order was produced as exhibit No. 1. He gave evidence that he got another court order dated 4th November 1997 in CMCC No. 4687/1997 which allowed the seizure of his properties and also attached three of his containers at Kenya Ports Authority. The said court order was to the effect that he could not clear the containers.

10. PW1 gave evidence that the above mentioned orders were stayed by the High Court in HCCC 264 of 1997. They were later on quashed by orders issued by Waki J (as he then was) on the 24th February 2000. The said decision was appealed against but the Appeal was dismissed. After the quashing of the restraining orders, PW1 went to the defendant to claim his containers. These were container Nos. PCIU 2237645, OCLU 1168374 and APMU 2639597. He was given a waiver of demurrage for container No. PCIU 2237645. The said container does not form the subject of this suit but together with the other 2 containers, it has been mentioned in several correspondence between the plaintiff and defendant. It was the evidence of PW1 that he requested to see the goods in container No. PCIU 2237645. He found the goods were 75% damaged. The defendant requested him to write to them an indemnity letter and not to claim any other container so that the said container would be released to him. He refused to do so and abandoned the said container. He did not know what happened to it.

11. PW1 testified that the value of the goods in container No. OCLU 1168374, was US\$ 282,900/=. The container had a mixture of printed velvet material, which was 70 (sic) yards and Dorby Gorgette material 90 (sic) yards as contained in the packaging list. The material was 106,000 yards in total.

12. With regard to container No. APMU2639597, PW1 stated that he paid US\$ 50,000 to Fortune & Holding in Thailand and was issued with an invoice for 192 bales of woven fabric measuring 60,000 yards. The price for the same was discounted from US\$ 50,700/=.

13. PW1 testified that he met with the defendant's Head of Commercial department **Mr. Athman Adam** who referred him to one **Mohamed** who took him to the defendant's yard where they met one **Kibrengre**. He asked him where the plaintiff's goods were. **Kibrengre** told them the goods were 3 years old and container No. APMU (sic) was stripped. **Kibrengre** confirmed that container Nos. PCIU 2237645 and OCLU 1168374 were in the defendant's yard. PW1 indicated that they promised him that they would process his documents. They told him to leave and promised to contact him. Several months went by with no word from the defendant. That prompted him to write to the defendant several letters requesting for release of his goods. The defendant kept on telling him to hold on. He indicated that he would be called by the defendant and when he would go there, he would be told of their procedures.

14. PW1 testified that he met **Mr. Dulu** the Head of the Secretariat and Head of Legal, Kenya Ports Authority and **Madam Gatere** who was his Assistant. He also met **Jilo** who was a Lawyer. He asserted that they were all telling him to hold on as they did not know where his containers were. PW1 further indicated that the plaintiff's advocate wrote to the defendant claiming the goods. After some time, **Madam Gatere** called him inquiring about his relationship with Shams Impex Ltd Uganda and Katembo International of Bunia, Zaire. He then had a meeting with her in which she asked about the relationship he had with the two companies. He explained that he purchased the goods according to the samples given by the two companies. He was required to clear the goods and transport them to their final destinations. They would then refund to the plaintiff the purchase price and other expenses for clearing and transportation. PW1 explained that the two companies were expected to pay the plaintiff 10% of the original invoice price as their agency fee and pay a top up of 5% per month purchasing price from the date of shipment until the date of refund.

15. He testified that when **Madam Gatere** asked him to prove that he could do the job, he showed her the assignment he had been given which was addressed to the Managing Director of the defendant. PW1 stated that the assignment gave him the power to sue if the goods were not released by the defendant. She asked for documentation to prove the assignment and she was furnished through the Managing Director, Kenya Ports Authority with letters from both companies giving the plaintiff the right to sue.

16. PW1 stated that **Madam Gatere** asked him for the original bill of lading but he gave her a police abstract and she was happy with that. Later on he was informed that the defendant was undertaking investigations into the disappearance of the said containers. Around November 2001, he was handed two reports dated 30th April 2002 by the defendant which concluded that container Nos. OCLU 1168374 and APMU 2639597 disappeared in their custody. The reports recommended that the plaintiff be compensated for the loss. He further testified that investigation reports from the Police dated 13th June 2001 and 11th June 2001 came to the conclusion that the goods disappeared in the hands of the defendant. He indicated that while still communicating with the defendant, his Lawyer told him he had received a letter dated 12th November, 2001 (exhibit 7), in which the defendant had denied the whole claim.

17. When asked by the Court how he was entitled to the goods, PW1 stated that the two companies for which he imported the goods gave him the right of assignment. He did not collect the goods earlier since there were freezing orders from November 1997 to February 2000 and it took him till November 2002 because the defendant kept on giving him hope. He received a letter on 21st November, 2001 from **Dulu**, denying liability and that is why he sued in November, 2002.

On cross-examination by Mr. Khagram

18. PW1 stated that he has more than one signature because of his business interests and that other than his letters he had no document to show that he was a director of the plaintiff company. He stated that a shipping line issues a delivery order while a bill of lading is a title document issued once the container is loaded on a ship. He clarified that once a person receives a bill of lading they can confirm from the defendant if the goods have arrived or the manifest from them can establish if the goods have arrived. He explained that at the time of clearing the goods, one surrenders the original bill of lading to the shipping line which in turn issues a delivery order which becomes the document of title. The said document is then presented to customs and sometimes warehouse charges can be incurred if the goods are on transit.

19. On being referred to container No. OCLU 1168374, PW1 indicated that the invoice for the cargo was in the name of Shams Impex. He explained that the plaintiff had financed the purchase of the cargo as an agent of Shams Impex. The plaintiff was to charge 5% every time it did not get a refund in good time. It was to get 10% commission from the said company for having purchased the goods for them. PW1 confirmed that the cargo arrived but he did not surrender the bill of lading as he was only in possession of a police abstract which was made on the 27th October 1997.
20. PW1 stated that the bill of lading was in the briefcase that was taken by the Auctioneers and it got lost. He did not go back to the shipping line to ask for a delivery order.
21. He stated that the police report in regard to Container No. OCLU 1168374 was that P&O (P&O Nedlloyd) did not keep records for more than three years.
22. PW1 also stated that investigations by the defendant as reflected on page 17 of the plaintiff's bundle of documents was proof that container No. APMU 2639597 landed at the Port of Mombasa.
23. He indicated that he did not know **Jean Pascal** of Bunia, Zaire. PW1 stated that he had the original bill of lading which he did not lodge because the container went missing.
24. PW1 stated that the plaintiff was not a consignee of container Nos. OCLU 1168374 and APMU 2639597 but they were given the assignment. In regard to container No. OCLU 1168374, he said it was shipped to Mombasa on the 20th October 1997. P&O Nedlloyd were the agents. The said agents indicated that the GTS tracking system was never tracked to Mombasa and the shipment never materialized thus never landed in Mombasa. According to PW1, the shipment indeed arrived at the port of Mombasa as there was an admission from the defendant.
25. PW1 stated that he received the original bill of lading for container No. OCLU 1168374 but he did not receive a notice of arrival of the said container but documents show that the due date was the 19th November 1997. The container however arrived on the 21st November 1997 and was discharged at berth 18. He further stated that the document that could be used to establish the movements of the said container from the date of discharge to the date of disappearance from the Port could not be traced at the parent section container terminal.
26. PW1 stated that he did not go to P&O Nedlloyd to establish if the container landed at the Port of Mombasa. He went straight to the defendant to trace his container OCLU 1168374 and he knew that the container could not be released by the defendant without the shipping line releasing it first.
27. In making reference to the defendant's supplementary list of documents at page 2, PW1 said that there was a transit entry with regard to container APMU 2639597, there was also a KRA entry stamped on the 27th March 1998 meaning the goods were released to Jean Pascal of Zaire. He said that the procedure is for the defendant to release the goods then KRA deals with customs issues.
28. On re-examination, PW1 stated that the defendant had informed them that they were investigating the matter and they had admitted that the said containers disappeared at the Port. He said that he did not trust the veracity of the letter from P&O Nedlloyd.

The defence case

29. **Rose Nyalwal** testified on behalf of the defendant as DW1. She adopted her witness statement filed in court. The witness did not elaborate much on the contents of her witness statement but offered to be cross-examined by the plaintiff's Counsel.
30. On being cross-examined by **Mr. Omwenga** Advocate, as regards container OCLU 1168374, DW1 responded that as per P&O Nedlloyd which is a shipping line, the container never landed at the Port of Mombasa. On being referred to the letter dated 30th April, 2001 by the defendant's security department which carried out investigations, she said that according to the said letter, container No. OCLU 1168374 arrived at the Port of Mombasa. With regard to container No. APMU 2639597, she confirmed that through a letter dated 2nd May, 2001, **Mr. Kombe** who was in charge of the security department of the defendant said that the documents that could have been used could not be traced. DW1 confirmed that as per the letter by the security department, the containers were shipped and the goods got lost in the custody of the defendant. In reference to the letter dated 11th June, 2001 written by the OCPD Kilindini addressed to the Commercial Manager, DW1 said that it indicated that the defendant could not trace container No. OCLU 1168374.
31. With regard to container No. APMU 2639597, DW1 stated that the said container was delivered to **Jean Pascal** as per the Mombasa Port Release Order contained in the defendant's list of supplementary documents and the transit entry. She stated that the documents therein are not related to the plaintiff herein as the names of the consignee are different.
32. DW1 concurred with the plaintiff's Counsel that the defendant has a responsibility to hand over goods to consignees after all the processes have been met and it has a duty to pay if goods get lost in their custody. She had no evidence that the plaintiff received the consignment.
33. On re-examination, DW1 stated that the letter from P&O Nedlloyd stated that container No. OCLU 1168374 never landed in Mombasa as the shipment never materialized.

SUBMISSIONS

34. **Mr. Omwenga** Counsel for the Plaintiff submitted that the defendant raised a preliminary objection under Section 65 of the Kenya

Ports Authority Act citing failure by the plaintiff to issue a notice, which objection was dismissed by the High Court. He further submitted that the order for dismissal was never appealed against. He stated that the plaintiff's suit could not be dismissed based on the clear provisions of Article 48 of the Constitution. The plaintiff's Counsel relied on the case of **Bob Thompson Dickens Ngobi vs Kenya Ports Authority & others** [2016] eKLR.

35. Counsel submitted that the plaintiff would not have had in his possession the bills of lading produced in court if the containers were not on board the two ships, namely Ned Merwe and MV Maersk Asia Decimo. He made reference to the report by the Police which stated that the motor vessel Ned Merwe which was carrying container No. OCLU 1168374 arrived at the Port of Mombasa on the 21st November 1997 and berthed at berths 13 and 18.

36. Counsel also submitted that the defendant through its Assistant Corporation Secretary vide letter dated 14th May 2001 admitted that container No. APMU 2639597 was shipped and all they wanted to know from the owner was the value of the invoice of the 192 bales of woven fabric Lot stock 13/97. Another letter of the same date was addressed to the owner of the items in container No. OCLU 1168374 which arrived aboard Ned Merwe. The defendant wanted to know the invoice value of the said consignment in US dollars to enable them process the claim. It was argued that the foregoing was evidence that the containers were shipped and received at the port of Mombasa.

37. **Mr. Omwenga** submitted that this Court should not rely on the letter from **Mr. Brown M Ondego** who was the Managing Director of Kenya Ports Authority and at the same time a Director at P&O Nedlloyd as he most likely influenced the contents of the letter dated 27th August 2001 which was not supported by any investigation report.

38. Counsel further submitted that the defendant was estopped from denying the fact that the said container landed in Mombasa. Reliance was placed on the case of **Serah Njeri Mwobi vs John Kimani Njoroge** [2013] eKLR on the doctrine of estoppel

39. On whether the defendant ought to be held liable for the loss of the containers, Counsel submitted that the defendant has powers as a warehouseman under Sections 12, 22 and 23 of the Kenya Ports Authority Act to ensure that no goods under its care are lost or damaged. He relied on the case of **Modern Holdings (E.A) Ltd v Kenya Ports Authority** [2016] eKLR and **Timberland Kenya v Kenya Ports Authority** [2010] eKLR.

40. Counsel also submitted that the defendant and the plaintiff were in a contract of bailment by virtue of the defendant being a warehouseman and it was the duty of the bailee to ensure that the plaintiff's goods were placed in safe custody. He relied on the case of **Coggs v Benard (1558-1774) 1 ALL ER.**

Defendant's submissions

41. **Mr. Khagram**, Learned Counsel for the defendant submitted that Section 66(b) of the Kenya Ports Authority has a material impact on this matter. He further submitted that container No. OCLU 1168374 was reported lost between 27th November 1997 and 20th April 2001 thus time started running on the 21st April 2001 and for purposes of Section 66 of the Kenya Ports Authority Act, the claim was time barred.

42. With reference to container no. APMU 2639597, he indicated that it was said to have been lost between January 1998 and 26th April 2001 and for the purposes of Section 66(b) of the Kenya Ports Authority Act, the claim was time barred. Consequently, no action should have been instituted on this account on 11th November 2002 as the same was prohibited by the said provisions.

43. Counsel relied on the case of **Bob Thompson Dickens Ngobi vs. Kenya Ports Authority & Others** [2017] eKLR where a claim was held to be time barred and in **Summit Cove Lines Co. Ltd vs Kenya Ports Authority** [2018] eKLR where it was held that the general provisions under Cap 22 are not applicable as Section 66 of the Kenya Ports Authority Act is specific on limitation.

44. Counsel also submitted that any suggestion that Article 48 of the Constitution provides a saving grace to the plaintiff's position is wholly erroneous and misconceived as the Article was only cited in so far as the provisions of Section 65 of Kenya Ports Authority Act, requiring the issuance of a notice of at least 30 days.

45. Counsel submitted that the plaintiff was not in a position to confirm or deny that the consignee of container No. APMU 2639597 had taken delivery of the said container.

The plaintiff's rejoinder

46. In response to the defendant's submissions, the plaintiff's Counsel filed supplementary submissions whereby he submitted that the plaintiff never pleaded the exact date when the cause of action accrued and at no point did it receive official communication from the defendant confirming that the subject containers and the goods therein were lost.

47. Counsel also submitted that the existence of court orders in CMCC 4687 of 1997 delayed the lodging of the claim coupled with letters from the defendant seeking for more time to investigate the matter.

48. He also further submitted that the suit herein was filed on the 11th November 2002 just about five (5) months after the defendant's letter dated 26th June 2002 thus the plaintiff was made to believe that the defendant was acting in good faith but unfortunately that was not the case. He concluded by stating that the defendant was estopped from alleging that the suit was statutorily time barred.

ANALYSIS AND DETERMINATION

49. The issues for determination are-

- (i) If the plaintiff served the defendant with a notice of intention to sue and if it did not, was it fatal to the plaintiff's case?
- (ii) Whether the plaintiff's suit is statutorily time barred;
- (iii) If the ships carrying container Nos. OCLU 1168374 and APMU 2639597 docked at the port of Mombasa and if so, whether the said containers were offloaded and got lost and/or stolen when in the custody of the defendant;
- (iv) If the defendant is liable for the loss of the containers;
- (v) If the plaintiff is entitled to be compensated by the defendant for the amount prayed for in the plaint; and
- (vi) Who will pay the costs and interests of the suit?

If the plaintiff served the defendant with a notice of intention to sue and if it did not, was it fatal to the plaintiff's case?

50. The provisions of Section 65 of the Kenya Ports Authority state as follows:-

“(1) No person shall be entitled to compensation for non-delivery of the whole of a consignment of goods, or for any separate package forming part of such consignment, accepted by the Authority for handling or warehousing unless a claim in writing, giving such particulars as may reasonably be necessary, is given to the Managing Director within six months of the date upon which such goods were accepted by the Authority.

(2) No person shall be entitled to compensation for any goods missing from a packed or unpacked consignment of, or for misdelivery of, or damage to, any goods accepted by the Authority for handling or warehousing unless—

(a) the Managing Director is notified of such fact in writing within four days of the date upon which such goods were delivered to the consignee or person entitled to take delivery thereof; and

(b) a claim in writing, giving such particulars as may reasonably be necessary, is given to the Managing Director within one month of such date.

(3) Where the person claiming compensation proves that it was impracticable for him to notify the Managing Director, or give the Managing Director his claim, as set out in subsections (1) and (2) within the time specified therein and that such notification or claim was made or given in reasonable time nothing in those subsections shall prejudice the right of such person to obtain compensation”.

51. On 11th January, 2001 the law firm of Kinyua Kamundi & Co Advocates wrote to the Managing Director of the Kenya Ports Authority on behalf of the plaintiff who had instructed the said law firm to serve a notice of claim against the defendant in respect of container Nos. OCLU 1168374 and APMU 2639597 which seemed to have been lost while in its custody. The said letter was followed by another one dated 22nd August, 2001 in which the said law firm inquired if the two containers had been located. The Advocate suggested that if they had not been located, they should be furnished with payment in the sum of US\$333,666.7 together with interest of US\$80,080.00 as well as their collection charges in the sum of US\$5,000.00 making it an aggregate sum of US\$418,747.00. The said letter went on to state that unless they received the said amount, they would file suit against the defendant.

52. The Court of Appeal in **Kenya Revenue Authority vs Habimana Sued & another** [2015] eKLR had the following to say with regard of the need for serving a 30 days' statutory notice before the filing of a suit on the Kenya Revenue Authority which is a State Corporation just like the Kenya Ports Authority:-

“In our view, Section 70 of the Finance Act 1998 is mischievous, and only meant to enable the appellant steal a march against persons who have claims against it. The provision is not unconstitutional by virtue of the enactment of the Constitution of Kenya 2010, or because this Court said so in the Euroleaf Case (supra). The same was unconstitutional even before as it trampled on the rights of those who found themselves on the opposite/wrong side of the appellant. It carried with it unmitigated prejudice and discrimination as explained by the learned Judge in his judgment. The learned Judge envisioned the right of unfettered and speedy right to justice, even before the same was codified in the Constitution of Kenya 2010.”

53. In the above case, the Court of Appeal when making reference to the decision in **the Euroleaf case** was citing Civil Appeal No. 308 of 2005, **Kenya Revenue Authority, Customs and Excise Department vs Euroleaf Corporation** on the requirement for an intended litigant to give a 30 days' statutory notice of intention to sue to the Attorney General under the provisions of Section 13A of the Government Proceedings Act, Cap 40 laws of Kenya, the Court of Appeal stated thus-

“Even though we are satisfied that the requisite statutory notice was served, we do not fault the learned Judge on his finding that the said provision was unconstitutional. We therefore come to the inevitable conclusion that the proceedings before the High Court were regular, procedural, and properly before the Court.”

54. Counsel for the plaintiff cited the decision in the case of **Bob Thompson Dickens Ngobi vs Kenya Ports Authority** (supra). In this

court's view and I do agree with Mr. Khagram for the defendant, one of the issues addressed in the said case was on the provisions of Section 65 of the Kenya Ports Authority Act, which the court stated was in *pari materia* with the provisions of Section 13A of the Government Proceedings Act and Section 3(2) of Cap 469. Judge P. J. Otieno, while following the decision in **Kenya Revenue Authority vs Habimana Sued & another** (supra) held that the provisions of Section 65 of the Kenya Ports Authority were unconstitutional for being a violation of Article 48 of the Constitution of Kenya.

55. In this case, Judge Ibrahim (as he then was), left the issue of whether a statutory notice was issued to the plaintiff, to the Trial court to determine. The plaintiff herein issued a notice of claim dated 11th January 2001 and the same was received by the defendant on the 14th February 2001. A second letter dated 22nd August, 2001 was also sent to the defendant by the plaintiff. Going by the Court of Appeal decision, even if no statutory notice had been issued to the defendant, this claim would still be deemed to be properly before this court.

Whether the plaintiff's suit is statutorily time barred

56. The defendant through a Chamber Summons dated 29th August, 2008 raised a Preliminary Objection on a point of law that the suit herein was statutorily time barred. On 25th May, 2012 Judge Ibrahim (as he then was) in a ruling on the said issue stated as follows:-

"In the absence of express pleading of the date of the cause of action, the court cannot go into the affidavit evidence in an interlocutory application "to fish" for the date. This is a matter that can only be dealt with at the trial. In any case the court is not able to understand the exhibits annexed to the applicant's affidavits and they require verification and explanation through oral testimonies". (emphasis added).

57. With regard to limitation of actions, in the case of **Thuranira Karauri vs Agnes Ncheche** [1997] eKLR it was held thus:-

"The issue of limitation goes to jurisdiction and whenever it is raised, the court must deal with it before proceeding any further."

58. Section 66 of the Kenya Ports Authority Act provides as hereunder-

"Where any action or other legal proceeding is commenced against the Authority for any act done in pursuance or execution, or intended execution of this Act or of any other public duty or Authority, or in respect of any alleged neglect or default in the execution of this Act or of any such duty or authority, the following provisions shall have effect –

(a) the action or legal proceedings shall not be commenced against the Authority until at least one month after written notice containing the particulars of the claim, and of intention to commence the action or legal proceedings has been served upon the Managing Director by the plaintiff or his agent;

(b) the action or legal proceeding shall not lie or be instituted, unless it is commenced within 12 months next, after the act complained of or, in the case of continuing injury or damage, 6 months next after the cessation thereof." (emphasis added).

59. The documents produced in court by the plaintiff demonstrate that its witness, PW1, exchanged correspondence spanning several years with different Officers in the employment of the defendant. The said Officers strung along the plaintiff by giving it hope that container Nos. OCLU 1168374 and APMU 2639597 were being looked for. The same scenario persisted even after the plaintiff's Advocate wrote to the defendant the letters dated 11th January, 2001 and 22nd August, 2001. In his evidence, PW1 testified that the plaintiff filed suit in November, 2002 as the defendant kept on informing it that it would release the goods but later it turned out that it did not know where the goods were. PW1 asserted that the defendant kept on giving the plaintiff hope that the goods would be traced.

60. The foregoing is supported by the letter addressed to Kinyua Kamundi and Co. Advocates dated 28th February, 2001 whereby the said law firm was informed by the defendant that it had put its machinery to investigate the claim and would be in a position to give them a response in due course. The defendant asked the law firm to bear with them. On 7th March, 2001 the defendant informed the plaintiff's Advocates that they were seeking further instructions and would revert soon. In a subsequent letter dated 17th April, 2001 the defendant informed the said law firm that investigations with regard to container Nos. OCLU 1168374 and APMU 2639597 were still underway. On 9th January, 2002 the defendant wrote to the plaintiff informing it that its Advocate Kinyua Kamundi & Company Advocates had been informed that container No. OCLU 1168374 was not shipped or landed at the Port of Mombasa. The defendant sought an explanation from the plaintiff as to why it lodged a claim for the said container.

61. Following a meeting on 22nd July, 2002 between **Ms Gatere** in her office in which she sought an explanation from the plaintiff on its relationship with Shams Impex (Uganda) Limited and Katemba De Internationale of Bunia, Zaire the plaintiff on the same day wrote to the defendant explaining its relationship with the two companies. Further, on 5th September, 2002 Katemba De Internationale of Bunia, Zaire wrote to the defendant's Managing Director informing him that it had given an absolute assignment of its claims and rights for container No. APMU 2639597 to the plaintiff. On 12th September, 2002 Shams Impex (Uganda) Limited assigned its rights to pursue the claim against the defendant for container No. OCLU 1168374 through a letter written to the defendant's Managing Director.

62. In the written submissions filed by the defendant's Counsel, it was submitted that the cause of action for container No. OCLU 1168374 arose on 21st April, 2001 and the claim stood time barred on 20th April, 2002 as the said container was reported lost between 27th November, 1997 and 20th April, 2001. In regard to container No. APMU 263957, it was submitted that time started to run on 27th April, 2001 and the claim stood time barred on 11th November, 2002. The authority of **Summit Cove Lines Co. Ltd vs Kenya Ports Authority** [2018] eKLR was cited by the Counsel for the defendant in support of its argument. The High Court therein said as follows-

"Granted that Cap 22 is the general statute that provides for the general law of limitation, I consider that it is not applicable to

the defendant because the defendant as a creature of statute has its own unique law which is a complete code under Cap 391. I consider Section 66 Kenya Ports Authority Act to be so specific and complete for the defendant's purposes that one does not need to invite the general provisions under Cap 22."

63. Going by the prolonged communication between the parties herein, it is clear that the plaintiff was hamstrung by the defendant which kept on blowing hot and cold by giving it promises of trying to trace the containers in issue. Proposals were made by the Head of Security of the defendant for compensating the plaintiff for the loss of the 2 containers. Taking all the above factors into consideration, it is this court's finding that the course of action for the loss of the said containers cannot be said to have commenced on the dates cited by the Counsel for the defendant. On 12th of November, 2001 the defendant's Corporation Secretary and Head of Legal Services wrote to the Plaintiff's Advocates, Kinyua Kamundi & Co Advocates denying liability for the claim made by the plaintiff for container Nos. APMU 2639597 and OCLU 1168374. The author of the said letter also stated as follows-

"Any legal action taken will be defended at your client's risk as to all costs and other consequences. Please also note that the Kenya Ports Authority (Cap 391) provides for limitation of liability for cargo claims. Therefore the claim for interest and collection charges is not payable by Kenya Ports Authority." (emphasis added).

64. The letter dated 12th November, 2001 was produced in court as the plaintiff's exhibit No. 7. It is discernible from the said letter that the defendant was directly telling the plaintiff to file suit against it for the loss of the 2 containers, if it so wished, as it had no intention to compensate it. The plaintiff also cautioned the plaintiff that according to it, the countdown for the filing of a suit had begun. The defendant therefore threw the ball to the plaintiff's court. The defendant did not disclose when it served the plaintiff with the said letter. On the body of the said letter on page 1, there is an inscription made by hand that it was received on 19th November, 2001. Relying on the said information, this court holds that the cause of action in this suit commenced on 19th of November, 2001. The plaint herein was filed on 12th November, 2002. This court therefore holds that the suit was filed within the 12 months from when the cause of action arose. Section 66(b) of the Kenya Ports Authority Act was therefore complied with and the suit herein is not statutorily time barred.

If the ships carrying container Nos. OCLU 1168374 and APMU 2639597 docked at the Port of Mombasa and if so, whether the said containers were offloaded and got lost and/or stolen when in the custody of the defendant

65. The plaintiff through PW1 produced a letter assigning it all the right to claim container No. OCLU 1168374. The bill of lading, packing list, arrival notice for the motor vessel Ned Merwe and invoice for the goods which were contained in the said container were produced. The bill of lading No. JKTCF926 showed that the goods were put on board motor vessel Ned Merwe. From the invoice and packing list, as stated by PW1, the goods were 70,000 yards of spandex velvex printed material and 90,000 yards of Dobby Georgette material. The value of the goods was US\$282,900. The arrival notice gave the 19th of November, 1997 as the date the ship was expected to dock at the Port of Mombasa. The costs of the goods, insurance and freight came to US\$ 283,666.66.

66. A letter dated 30th April, 2001 was produced by PW1 in support of the plaintiff's case. It was authored by one **H. N. Kombe** the Head of Security Services of the defendant. It was addressed to the defendant's Commercial Manager. It stated that motor vessel Ned Merwe docked on 21st November, 1997 and discharged (cargo) at berths No. 13 and 18. The said Head of Security further stated that the documents in respect to the said motor vessel could not be traced in their documents' store as they were among many other accountable documents which were washed away and destroyed by the *EL Nino* rains of 1997 which flooded the said store. The Head of Security Services in the said letter went on to say that they had managed to get a copy of the manifest extract page for the container No. OCLU 1168374 1x40' STC general merchandise which arrived onboard Ned Merwe of 21st November, 1997 from the shipping line. The letter said that the said container was discharged at berth No. 18 of the container terminal.

67. The said letter further stated that container No. OCLU 1168374 was among 2 other containers No. AMPU 2639597 and PCIU 2237645 which were the subject of a court order dated 4th November, 1997 prohibiting the release of the containers by the defendant to any party, pending the hearing and determination of the dispute which was in court. The said order was subsequently quashed in High Court Civil Suit No. 264 of 1997. The defendant's Head of Security further said that despite the court order restricting the movements of the said containers, only one container No. PCIU 2237465 was available at the port container terminal entry gate security area. The whereabouts of the other 2 containers was unknown. The conclusion of the letter was that container No. OCLU 1168374 had mysteriously disappeared from the defendant's custody.

68. Port Police carried out independent investigations about container No. OCLU 1168374, **K.A. Mwanzani** of the DCI Port Police Kilindini through a letter dated 11th June, 2001 addressed to the Commercial Manager of the defendant stated that the Police tried to track the roots of the alleged container through documents but all in vain. It was also said that the *EL Nino* rains had interfered with the documents at the Container Terminal. The said Investigating Officer said that P&O Nedlloyd Shipping Line could not keep its documents for more than 3 years. The conclusion was that efforts to trace the container had been fruitless and the recommendation was for the authority to liaise with the claimant.

69. DW1 who testified for the defendant on being cross-examined by Mr. Omwenga said that she was not aware that investigations had been done by the defendant's Security department and the Port Police. The said witness said that the defendant received a letter from P&O Nedlloyd stating that container No. OCLU 1168374 never landed. Indeed a letter dated 27th August, 2001 from the said shipping line addressed to the Managing Director of the defendant states so. It is the finding of this court that the said letter cannot be given any weight considering that the defendant had in its investigations and those of the Port Police confirmed that the said container landed aboard the motor vessel Ned Merwe and that the ship discharged at berths No. 13 and 18 at the Port of Mombasa. Furthermore, the subject container was discharged at berth 18 at the Port of Mombasa.

70. In order to controvert the outcome of the investigations that had been carried out, the defendant should have availed a witness from P&O Nedlloyd to testify and be subjected to cross-examination on the contents of its letter dated 27th August, 2001. The Investigating Officer from Port Police in his report dated 11th June, 2001 indicated that the defendant did not reply to the plaintiff until after 11 months and that P&O Nedlloyd did not keep its documentation for more than 3 years. It is therefore surprising that as at 27th August, 2001, the said

company came up with information regarding the movement of container No. OCLU 1168374 and concluded that it was not discharged at the Port of Mombasa on 27th November 1997.

71. It was suggested by the plaintiff's Advocate in their submissions that the information given by P&O Nedlloyd could have been influenced by **Brown Ondego** who was a previous employee of the shipping line (P&O Nedlloyd) and was the Managing Director of the defendant at the time the plaintiff lodged its claim. This court wishes not to comment on the said suggestion. What has emerged is that there was conflicting information availed to this court from the documents produced by the plaintiff and the defendant on whether or not container No. OCLU 1168374 landed at the Port of Mombasa. From an analysis of the evidence adduced and the documents and correspondence which have been referred to in the body of this Judgment, this court is of the finding that container No. OCLU 1168374 was discharged from motor vessel Ned Merwe on 27th November 1997 at the Port of Mombasa. It thereafter disappeared in the custody of the defendant. PW1 gave evidence that the original bill of lading for the said container was in a briefcase which was taken away by Auctioneers when there was a dispute between him and the plaintiff's co-directors. He reported the matter to Central Police Station and he was issued with a police abstract. He never recovered the briefcase. He therefore produced a copy of the bill of lading in evidence.

72. With regard to container No. APMU 2639597, PW1 produced a letter dated 2nd May, 2001 by **H. N. Kombe** the defendant's Head of Security addressed to the Commercial Manager of the defendant which confirmed that the consignment landed at the Port of Mombasa on board the Maersk Asia Decimo on 5th November, 1997 in the 1st shift. The letter further stated that the container was transferred from the container terminal to "H" Section and that on 19th January, 1998 the said container was stripped as per the stripping tally No. 31287 and a total of 192 bales of fabric were tallied. The letter also said that shed No. 13/14 was to be demolished to pave way for an open container yard and the operation greatly interfered with their investigations as staff had been transferred to different sections in the Port and records misplaced. It was said that records to ascertain the allocation of staff and equipment involved in handling the said missing cargo could not be traced.

73. In the letter dated 2nd May, 2001, the said Head of Security observed the cargo was stripped and it subsequently disappeared from the custody of the defendant in mysterious circumstances. In conclusion he said that the defendant had no alternative but to accept loss of the 192 bales of woven fabrics when within its custody.

74. The DCI Port Police, Kilindini carried out investigations in respect to container No. APMU 2639597 and found that he could not find a way for recovery of the goods or possible arrest of any culprit but confirmed that the said container disappeared in the hands of the defendant. He recommended for the defendant to liaise with the plaintiff. He further said that documents could not be traced as it was said that the *El Nino* rains interfered with the documents at the container terminal and that P&O Nedlloyd did not keep documents for more than 3 years.

75. PW1 gave evidence that the value of the goods in container No. APMU 2639597 was US\$50,000. DW1 testified that the container was released to a consignee by the name of **Jean Pascal** after he paid the relevant charges. A bill of lading dated 8th September, 1997 was produced by PW1 for the subject container. The name of the consignee was Katemba De Internationale of Bunia, Zaire. That was the container the defendant's Head of Security indicated in his letter to the Commercial Manager that it arrived in Kenya on 5th November, 1997 and was subsequently stripped and confirmed that it contained 192 bales of fabric. The said information corresponds with that contained in the bill of lading produced by PW1 which showed that 192 cartons of textile pieces were in container No. APMU 2639597. He produced an invoice for the plaintiff's goods in the said container.

76. DW1 produced a Port Release Order for container No. APMU 2639597 which was released on 11th June, 1998 to on **Jean Pascal** of Bukavu, Zaire. A keen look at the Port Release Order indicates that release of the container was at first rejected because the arrival date was wrong as per the manifest. A rejection No. was given as 41670 and an Officer initialed the said rejection on 7th of June, 1998. The document shows that the said entry was cancelled and the container went through the clearing process at the Port of Mombasa. It is my finding that the container No. APMU 2639597 which was released to **Jean Pascal** is the same one that was being claimed by the plaintiff.

77. In my view, the plaintiff's goods and those cleared by **Jean Pascal** could not have been different shipments as submitted by Counsel for the plaintiff. The cargo that was released to **Jean Pascal** was 192 bales of textile. The cargo that was being claimed by the plaintiff was 192 cartons of textile. It cannot be a coincidence that the goods packed in container No. APMU 2639597 being claimed by the plaintiff and the goods which were in the said container which were cleared by **Jean Pascal** were similar both in quantity and description. As at the time the said cargo was cleared, the plaintiff was still following up on his goods which he was told could not be traced by the defendant. It can therefore not be said that the said container No. APMU 2639597 was used for a subsequent shipment containing goods imported by **Jean Pascal**.

78. PW1 produced the bill of lading for container No. APMU 2639597 and an invoice for the purchase of the said goods. The consignee was Katemba De Internationale and not **Jean Pascal**. DW1 produced the Port Release Order but not the other documents that were lodged by **Jean Pascal** at the time he cleared the cargo from the defendant. It is therefore the finding of this court the plaintiff's container No. APMU 2639597 was released to the wrong consignee, one **Jean Pascal** of Bukavu, Zaire. This court states so as the proper consignee was Katemba De Internationale of Bunia, Zaire which appeared on the bill of lading and invoice for the said goods. The said consignee assigned its rights to the plaintiff to sue for the same after it failed to receive its goods.

If the defendant is liable for the loss of the containers

79. There is ample oral and documentary evidence that the ships carrying container Nos. 1168374 and APMU 2639597 landed on different dates at the Port of Mombasa. The two containers were offloaded and placed in the custody of the defendant. One of the duties of the defendant is to act as warehousemen and in so doing it has to exercise due care and has to act responsibly to ensure that goods entrusted to it do not get lost or stolen under its watch. DW1 in cross-examination admitted that it was the defendant's responsibility to hand over goods to consignees after all the processes had been met and the defendant has the duty to pay if goods get lost in their custody. She had no evidence that the plaintiff ever received its goods. It was apparent that she was not familiar with the circumstances surrounding the loss and did little to advance the defendant's case.

80. Section 12(1)(e) of the Kenya Ports Authority provides that the defendant shall have power to act as warehousemen and to store goods whether or not such goods have been or are to be handled as cargo or carried by the Authority. Section 22 of the said Act provides that the defendant will be liable for loss, misdelivery, detention or damage caused by want of reasonable foresight and care on the part of the defendant. Section 23 of the said Act limits the extent of liability to the value declared at the time the goods are deposited with the defendant.

81. **Stroud's Judicial Dictionary, 4th Edition** cites the case of **Mason v Lickbarrow 1 BI.H. 359**, in which Loughborough C.J, said as follows regarding a bill of lading-

“A bill of lading is the written evidence of a contract for the carriage and delivery of goods, sent by sea for certain FREIGHT. The contract, in legal language, is a contract of BAILMENT..... in the usual form of the contract, the undertaking is to deliver to the order, or assigns, of the shipper..... The indorsement of the bill of lading is simply a direction of the delivery of the goods.”

82. The Court of Appeal in **Securicor (Kenya) Limited v. E.A. Drapers Limited & Another** (Civil Appeal No. 67 of 1985) (unreported) cited with approval the English case of **Morris v. C.W. Martin & Sons Limited (1965) 2 ALL E.R. 725** wherein Lord Denning M.R. put it as follows:-

“When a principal has in his charge the goods or belongings of another in such circumstances that he is under a duty to take all reasonable precautions to protect them from theft or deprecation, then, if he entrusts that duty to a servant or agent, he is answerable for the manner in which that servant or agent carries out his duty. If the servant or agent is careless so that they are stolen by a stranger, the master is liable. So also, if the servant or agent himself steals them or makes away with them.”

83. The principal of bailment was applied in the English case of **Morris vs C.W. Martin & Sons Limited [1966] 2 ALL E.R. 725** where Lord Diplock at p.735 stated thus:-

“One of the common law duties owed by a bailee of goods to his bailor is not to convert them, i.e., not to do intentionally in relation to the goods an act inconsistent with the bailor's right of property therein... This duty, which is common to all bailments as well as to the other relationships which do not amount to bailment, is independent of and additional to the other common law duty of a bailee for reward to take reasonable care of his bailor's goods. Stealing is the simplest example of conversion... if the bailee in the present case had been a natural person and had converted the Plaintiff's fur by stealing it himself, no one would have argued that he was not liable to her for its loss; but the defendant bailees are a corporate person. They could not perform their duties to the plaintiff to take reasonable care of the fur and not to convert it otherwise than vicariously by natural persons acting as their servants or agents. It was one of their servants, to whom they had entrusted the care and custody of the fur for the purpose of doing work on it, who converted it by stealing it. Why should they not be vicariously liable for this breach of duty by the vicar whom they had chosen to perform it?

84. In the present case, the plaintiff had the bills of lading for the two consignments which showed that the goods were destined to consignees in Uganda and Zaire. PW1 testified that the plaintiff bought the goods from suppliers at its cost. It was required to supply the goods to the consignees and thereby recoup the cost price and make a commission of 10% and 5% of the value of the goods for any delays occasioned by the consignees in making good the payments. Once the goods were offloaded at the port of Mombasa, there arose a contract of bailment between the defendant and the consignees to make good the delivery of the goods when called upon to do so. The said consignees assigned their powers to the plaintiff to sue. Having failed to deliver the 2 containers that form the subject of this suit, the defendant is liable to the plaintiff for the lost goods.

85. In the case of **United Manufacturing Company Ltd. v. Wafco Ltd [1974] E.A. 233**, the majority of the Judges of the then Court of Appeal held that a bailee would be vicariously liable for its employees' acts. Mustafa, J.A. said at page 243:

“I think it is clear that the respondent's employees were engaged in bonded warehouse to safeguard and look after the goods stored by the appellant. In stealing or helping to steal such goods while in their custody they would clearly be acting in the course or within the scope of their employment, albeit in unlawful manner. The respondent would be liable for its employees' acts.”

86. Likewise, in this case the evidence clearly points to the loss of the two containers in the hands of the defendant's employees. I therefore find that the defendant which is a corporation is vicariously liable for the actions of its employees who led to the loss containers No. APMU 2639597 and OCLU 1168374 which had been entrusted to the defendant. This court holds that the plaintiff has discharged its burden of proof on a balance of probabilities.

If the plaintiff is entitled to be compensated by the defendant for the amount prayed for in the plaint as well as costs and interest in the suit

87. This court has found that the defendant is liable for the loss of container Nos. OCLU 1168374 and APMU 2639597. Judgment is therefore entered for the plaintiff against the defendant as follows-

(i) US\$440,439.00 broken down as follows-

(a) US\$283,666.66 being the value of the imported textiles in container No. OCLU 1168374; and

(b) US\$50,000.00 being the value of the imported textiles in container No. APMU 2639597;

(c) Had the said containers been released to the plaintiff on demand, he would have recouped the costs he incurred in purchase of the textiles which got lost in the hands of the defendant. He would also have made a 10% commission on the value of the goods from the consignees and 5% if the payment was delayed. The agreement between the plaintiff and the consignees was commercially driven and the plaintiff is therefore entitled to interest on (i)(a) and (b) above in the sum of 12% per annum from February 2000 to the date of the filing of the suit herein in the sum of US\$106,773.00 as prayed in the plaint. It is awarded the same;

(ii) Further interest at court rates from the date of filing this suit until payment in full; and

(iii) Costs of the suit.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 30TH DAY OF OCTOBER, 2019.

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. Omwenga for the plaintiff

Mr. Gitonga holding brief for Mr. Ondego for the defendant

Mr. Oliver Musundi - Court Assistant.