



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)

COMMERCIAL AND TAX DIVISION

CIVIL SUIT NO.548 OF 2015

IMPERIAL HEALTH SCIENCES KENYA LIMITED.....PLAINTIFF

VERSUS

WISEWAY FREIGHTERS LIMITED.....DEFENDANT

JUDGMENT

1. The plaintiff **IMPERIAL HEALTH SCIENCES KENYA LIMITED** sued the defendant herein through a plaint dated 30th October 2015 and filed on 3rd November 2016 praying for judgment against the defendant as follows:-

- a) *Kshs.48, 792,615/- in respect of unpaid or underpaid duties and taxes to KRA.*
- b) *Kshs. 844,740.65 in respect of the Defendants indebtedness to the Plaintiff as set out in paragraph 18 of the plaint.*
- c) *General damages.*
- d) *Interest on (a) and (b) above at court rates from the date of filing suit until payment in full.*
- e) *Costs of the suit.*
- f) *Any further relief that this Honourable court shall deem fit to grant.*

2. The defendant entered appearance on 4th January 2016 and filed a statement of defence on the same day denying the plaintiff's claim and praying for its dismissal with costs.

3. The plaintiff filed plaintiff's witness statement on 3/11/2015 together with the plaintiff's list of documents whereas the defendant filed defendant's list of witness and witness statement on 6th June 2016.

4. The case came for Case Management Conference on 3/3/2017 when the defendant though duly served did not appear, hence the court ordered the case was nearly for hearing and set the case down for hearing on 8/3/2017. The case did not proceed on that day and later on 9/5/2018 the same was set down for hearing on 18th July 2018. The defendant was duly served as per affidavit of service sworn on 17th May 2018 and filed on 17th May 2018. On the hearing day the defendant did appear and the case proceeded to hearing ex-parte.

5. On the hearing the plaintiff called **PW1** Martin Mbugua who relied on his statement dated 30th October 2015 and filed on 3/11/2015 as his evidence in chief together with the bundle of documents thereto filed on 3rd November 2015 (*exhibit 1*) from pages 1-81). He prayed for judgment as prayed in the plaint.

6. The plaintiff in this matter served the defendant as the plaintiff's agent. The plaintiff's claim relates to reimbursement of custom duty-payments that the defendant failed to pay to the **KRA**. The plaintiff had paid to the defendant the said sums as its agent pursuant to an agreement entered into between the plaintiff and the defendant where the defendant was to render to the plaintiff customs clearing and freight forwarding services.

7. During the hearing of the case only plaintiff appeared and gave evidence. The defendant though served did not appear. **PW1**, Mr. Martin Mbugua, adopted his statement sworn on 30th October 2015 as his evidence in chief and the bundle of documents. In his statement he stated that he is Finance Manager of the plaintiff company which has since May 2012 been using the defendant herein as its agent during which

period the plaintiff and the defendant entered into an agreement dated 31/10/2014 in which they agreed *inter-alia*:- that the defendant would render to the plaintiff customs clearing and freight forwarding services in respect of goods within the Republic of Kenya and such other ancillary services as may be requested by the plaintiff (*Agreement pages 1 to 24 of the plaintiff's bundle of documents exhibit 1*).

8. That sometimes in the month of May 2015 **KRA**, conducted an audit of the plaintiff's books, which to the plaintiff's shock, revealed that the defendant was not remitting full duties and taxes in respect of equipment's cleared on the plaintiff's behalf and that it turned out the documentation provided by the defendant was not proper resulting to **KRA** on 18th May 2018 issuing demand notice to the plaintiff calling for 7,849,719/- due and owing as customs duty on shipments cleared by the defendant on behalf of the plaintiff under the Agreement for the period January 2012 to May 2015 (*Demand notice at page 25 to 26 of plaintiff's Bundle of document exhibit 1*).

9. The plaintiff upon receipt of the demand notice called upon the defendant through a letter dated 3/6/2018 plus additional Kshs.1, 421,000/- being sum advanced to the defendant by the plaintiff in respect of duties and taxes for each truck not remitted to **KRA** by the defendant and further sum of Kshs.1, 467,776.57 being a credit balance on the plaintiff's account with defendant as at April 2015 for shipment not yet cleared and for shipment which was subsequently cancelled. (*Demand letter at page 27 and 28 of the plaintiff's Bundle exhibit 1*).

10. That on 25th June 2015 the defendant gave undertaking to pay the sum of Kshs.7,847,719/- demanded by KRA and gave further undertaking in event further monies would be found due or held to be due to **KRA** by the plaintiff or its clients as a result of any impending audits by **KRA** in relation to the business conducted by the defendant on behalf of the plaintiff, the said claims would be similarly paid by the defendant (*see copy of defendant's undertaking at page 29 of the plaintiff's Bundle of documents exhibit 1*).

11. The defendant did not honour its undertaking, meanwhile **KRA** through a letter dated 27th July 2015, demanded from the plaintiff's customer known as Pfizer Laboratories Limited a sum of Kshs. 54,742,483/- in respect of customs duty on shipment cleared by the defendant on behalf of the plaintiff under the agreement for the period January 2011 to June 2015 (*the letters and supporting documents from KRA at pages 36 to 63 of the plaintiff's Bundle of documents Exhibit 1*). The demand were made after a customs post clearance Audit on account of falsified and understated custom values made by the defendant whilst providing customs clearing and freight forwarding services in respect of goods within the Republic of Kenya and other ancillary services under the agreement.

12. The **KRA** demand on 27th July 2015 to the plaintiff's customer known as Pfizer Laboratories Limited in the sum of Kshs.54, 742,483 was subsequently reduced to Kshs.40, 944,897 after further reconciliation of accounts by **KRA** (*copy of the KRA E-slip at page 64 of the plaintiff Bundle of document exhibit 1*).

13. On 29th June 2015 the plaintiff was compelled to pay the total sum of Kshs.48, 792,615 to avoid any enforcement mechanism threatened by **KRA** thereby causing the plaintiff substantial loss and damages to its business operations within the country which operations are founded on the values of good faith and adherence to law (*see copies of payment report from the plaintiff's bankers M/s CFC Stanbic at pages 65 to 76 of plaintiff's Bundle of documents exhibit 1*).

14. The plaintiff further avers the defendant is indebted to the plaintiff in the sum of Kshs.844,740, being monies advanced by the plaintiff to the defendant in respect of duties and taxes for each trucks that were not remitted by the defendant to **KRA** and a credit balance on the plaintiff's account with the defendant as at April 2015 for shipment not yet cleared and for shipment which was subsequently cancelled (*see a copy of the statement of account at page 73 to 81 of the plaintiff's Bundle of document Exhibit 1*).

15. Having perused the pleadings and having considered the plaintiff's *ex-parte* evidence in absence of the defendant who was served and failed to appear the issues that has arisen are as follows:-

a) *Whether the plaintiff and the defendant entered into an agreement for provision of customs clearing and forwarding services subject to specific terms and conditions contained therein and whether the defendant was in breach of the express terms and conditions of the agreement and whether the plaintiff incurred losses and/or damages as a result of the breach of the agreement?*

b) *Whether the plaintiff's loss and/or damages were caused by the plaintiff's negligence as alleged in paragraph 9 of the defendant's statement of defence?*

c) *Whether the defendant is liable to indemnify the plaintiff to the KRA in respect of the unpaid and/or underpaid duties and taxes and whether the defendant is indebted to the plaintiff in the sum of Kshs.844, 740/65 as set out in the plaint?*

d) *Whether the plaintiff is entitled to General damages for breach of contract?*

A. Whether the plaintiff and the defendant entered into an agreement for provision of customs clearing and forwarding services subject to specific terms and conditions contained therein and whether the defendant was in breach of the express terms and conditions of the agreement and whether the plaintiff incurred losses and/or damages as a result of the breach of the agreement?

16. Before I commence dealing with this issue, I have to point out that other than the defendant having filed a statement of defence, it did not appear to give evidence in opposition to the plaintiff's claim which proceeded *ex-parte*. A filed defence cannot be taken as controverting the evidence given by the other side, if no oral evidence is adduced to the contrary. The defence therefore remains as a document that has no probative value and cannot be relied upon to challenge oral evidence given by a party in a suit. Without oral evidence, the defence cannot be tested through cross examination and it cannot be said to be worth considering.

17. The Plaintiff and the Defendant entered into an agreement dated 31st October 2014 ("*the Agreement*"), in which they agreed *inter alia*; - that the Defendant would render to the Plaintiff customs clearing and freight forwarding services in respect of goods within the Republic of

Kenya and such other ancillary services as may be requested by the Plaintiff, (A copy of the Agreement is produced at page 1-24 of the Plaintiff's bundle of documents).

18. Clause 5 of the Agreement made provisions for the Defendant's obligations. Specifically, clause 5.7 reads as follows:

"The Service Provider, its employees, agents and/or subcontractors performing Services in terms of this Agreement, shall sign the Foreign Corrupt Practices Act (FCPA) undertaking confirming that they will not engage in any conduct prohibited under the FCPA and that the Service Provider has put in place the requisite measures as required by the FCPA...."

19. Further, clause 14 of the Agreement reads as follows:

"14.1 Notwithstanding any other provision to the contrary contained herein, Service provider indemnifies and holds harmless IHS, its officers, directors, employees and agents from and against any losses, claims, costs damages, judgments, demands and expenses which IHS may suffer, incur or sustain as a result of:

14.1.1 Service Provider's willful or negligent acts or omissions in performance of this contract.

14.1.3 False claims submitted by Service Provider under the Agreement or as a result of Service Provider's misrepresentation of fact or fraud by the Service Provider..."

20. The Agreement was signed by both parties and its validity is not in contention. In fact, the Defendant has acknowledged the existence of the Agreement between it and the Plaintiff at per paragraph 5 of the Statement of Defence. Therefore, the Agreement is valid and enforceable between the parties.

21. Under clause 3.1 of the Agreement, the Plaintiff appointed the Defendant as its service provider to render custom clearing and freight forwarding services. Therefore, the relationship between the Plaintiff and the Defendant was that of principal and agent.

22. In the case of **National Bank of Kenya Ltd Vs. Pipeline Samkolit (K) Ltd & Another (2002) E.A 503**, the Court stated thus:-

"This, in our view, is a serious misdirection on the part of the Learned Judge. A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the clause."

23. The defendant did not give evidence denying breach of the contract. It was only the plaintiff who gave evidence on the terms of the contract and blamed the defendant for breach of the contract. **PW1** testified that **KRA** issued a demand notice to the Plaintiff calling upon the Plaintiff to make immediate payment of Kshs.7, 847,719/- due and owing as customs duty on shipments cleared by the Defendant on behalf of the Plaintiff under the Agreement for the period January 2012 to May 2015 (*the demand notice is at pages 25 to 26 of the Plaintiff's Bundle of Documents*). Subsequently, the Plaintiff called upon the Defendant to settle the amount demanded by **KRA** plus an additional sum of Kshs. 1,421,000.00 being monies advanced by the Plaintiff to the Defendant in respect of duties and taxes for each trucks that were not remitted by the Defendant to **KRA** and a further sum of Kshs.1,467,776.57 being a credit balance on the Plaintiff's account with the Defendant as at April 2015 for shipment not yet cleared and for shipment which was subsequently cancelled (*the demand letter is at pages 27 to 28 of the Plaintiff's bundle of documents*) the defendant failed to pay the amounts.

24. **PW1** further testified that the Defendant gave an undertaking to pay the sum of Kshs. 7,847,719/- demanded by **KRA** in full directly to **KRA** and further gave an undertaking that in the event further monies would be found due or held to be due to **KRA** by the Plaintiff or its clients as a result of any impending audits by **KRA** in relation to the business conducted by the Defendant on behalf of the Plaintiff, the said claims would be similarly paid by the Defendant (*a copy of the Defendant's undertaking is at page 29 of the Plaintiff's bundle of documents*). The Defendant proposed for the Plaintiff to pay the sum of Kshs.7, 847,719/- to **KRA** on the understanding that the Defendant would continue to clear the Plaintiff's goods without charge until the sum of Kshs.7, 847,719/- was repaid. A copy of the letter is at page 30 to 31 of the Plaintiff's Bundle of Documents). Subsequently, the Defendant again offered to pay the amount in issue by installments. However, the Defendant offer was not acceptable to the Plaintiff. This infact amounts to an admission of the debt. An admission can either be express or implied as was held in the case of **Choitram Vs Nazari [1984] KLR 327**, wherein Madan, J.A. stated thus:

"...admissions can be express or implied either on the pleadings or otherwise, e.g in correspondence...It matters not if the situation is arguable, even if there is substantial argument, it is an ingredient of jurisprudence, provided that a plain and obvious case is established upon admissions by analysis...."

25. **PW1** testified that **KRA** issued a demand notice to the Plaintiff calling upon the Plaintiff to make immediate payment of Kshs.7, 847,719/- due and owing as customs duty on shipments cleared by the Defendant on behalf of the Plaintiff's under the Agreement for the period January 2012 to May 2015 (*the demand notice is at pages 25 to 26 of the Plaintiff's Bundle of Documents*). Subsequently, the Plaintiff called upon the Defendant to settle the amount demanded by **KRA** plus an additional sum of Kshs. 1,421,000.000 being monies advanced by the Plaintiff to the Defendant in respect of duties and taxes for reach trucks that were not remitted by the Defendant to **KRA** and a further sum of Kshs. 1,467,776.57 being a credit balance on the Plaintiff's account with the Defendant as at April 2015 for shipment not yet cleared and for shipment which was subsequently cancelled (*the demand letter is at pages 27 to 28 of the Plaintiff's bundle of documents*). The Defendant failed to pay the amounts.

26. It was **PW1's** testimony that **KRA** made another demand notice and demand letter to the Plaintiff's customer known as Pfizer Laboratories Limited in the sum of Kshs. 54,742,483/- in respects of customs duty on shipments cleared by the Defendant on behalf of the Plaintiffs under the Agreement for the period January 2011 to June 2015 (*the letters and supporting documents from KRA are at pages 36 to*

63 of the Plaintiff's Bundle of Documents).

27. Under the Agreement, the Defendant was required to remit all taxes to **KRA** in respect every shipment. However, the Defendant failed to remit the custom duty payments to **KRA** despite receiving the requisite amounts from the Plaintiff to make such payments. In fact, the Defendant acknowledged its default and made an undertaking vide its letter dated 25th June 2015 (*at page 29 of the Plaintiff's Bundle of Documents*) to pay the sums demanded by **KRA** including any sums that will be found as a result of any impending audits.

28. In any case of **Nakana Trading Company Ltd Vs. Coffee Marketing Board [1990-1994] EA 448**, the court held that in a contract, a breach occurs when one or both parties fail to fulfil the obligations imposed by the terms. The Defendant in its capacity as a clearing agent for the Plaintiff under the agreement, failed to remit full customs duty in respect of the shipments cleared on behalf of the Plaintiff. Further, the Plaintiff falsified documents to mislead the Plaintiff that the taxes due had been fully paid, which was not the case.

29. The Defendant was bound to act in accordance with the Agreement. **Bowstead on Agency, 15th edition at page 138** provides as follows:

"An agent who is appointed by contract is bound to act in accordance with the terms of that contract and not exceed his authority...This rule is fundamental to every contractual agency...Likewise, he may not exceed his authority and "may be liable if he does..."

30. It is my view that the defendant's conduct of failing to use sound business practices in compliance with the law in clearing of goods and failing to remit the custom duty payments to **KRA** was in breach of the express terms of the Agreement specifically clauses 14.1.1 and 14.1.3. *Bowstead on Agency (supra)* at page 144 provides that:-

"Every agent acting for reward is bound to exercise such skill, care and diligence in the performance of this undertaking as it usual or necessary in or for the ordinary or proper conduct of the profession or business in which he is employed, or is reasonably necessary for the proper performance of the duties undertaken by him."

31. I have no doubt to state that the defendant as the plaintiff's clearing agent, the Defendant was duly bound to ensure that it uses sound business practices and at all times comply with the Kenyan Law and that all customs payments remitted to it by the Plaintiff were paid to **KRA**. The Defendant was also under a duty to ensure that all documents relating to the payments were proper and reflected a true account of all payments made to **KRA**. However, the Defendant failed to fulfil these obligations causing the Plaintiff substantial loss and damage.

32. I now turn to consider whether plaintiff incurred losses and/or damages as a result of the breach of the agreement on part of the defendant. In this suit there is no dispute that the Plaintiff incurred loss and damage. **PW1** testified that the Plaintiff was compelled to pay the total sum of Kshs.48,792,615 to avoid any enforcement threatened by **KRA** (*copies of the payment reports from the Plaintiff's bankers Messrs CFC Stanbic are at pages 65 to 70 of the Plaintiff's Bundle of Documents*) and **KRA** acknowledged the said payments (*copies of the acknowledgment letters are at pages 71 and 72 of the Plaintiff's Bundle of Documents*).

33. It was **PW1's** testimony that the Plaintiff transferred the requisite tax amount to the Defendant for every shipment, however, the Defendant failed to remit the custom payment. Therefore, the Plaintiff suffered loss and damage by paying the demanded tax, when it had already remitted the requisite tax to the Defendant.

34. In view of the above I find and hold that the defendant owed a duty to the Plaintiff to ensure that all customs payments remitted to it by the Plaintiff were paid to **KRA**. Since the Defendant has on the evidence failed to remit the payments, which the Plaintiff incurred losses, it is liable to pay the Plaintiff the loss and damage incurred by the Plaintiff.

B. Whether the plaintiff's loss and/or damages were caused by the plaintiff's negligence as alleged in paragraph 9 of the defendant's statement of defence?

35. It is alleged in the defendant's defence in paragraph 9 of its Statement that the Plaintiff's loss and damages were as a result of the Plaintiff's negligence. The particulars of the alleged negligence as pleaded by the Defendant are inter alia: - that the Plaintiff failed to raise any issue of impropriety against the Defendant during the subsistence of their business relations and failed to detect any fraudulent and false documents.

36. In the instant case, no evidence was adduced to establish the plaintiff's negligence. The allegations are without any evidence in support and are nothing but speculation. He who alleging is under duty to prove the allegation on balance of probability. I find no proof has been adduced before me.

37. It is trite law that a party in a contract cannot take advantage of this own wrong to seek a benefit against the other party. In the case of **Alghussein Establishment Vs Eton College (1991) 1All ER 267**, the Court held that:

"A party who seeks to obtain a benefit under a continuing contract on account of his breach is just as much taking advantage of his own wrong as is a party who relies on his breach to avoid a contract and thereby escape his obligations."

C. Whether the defendant is liable to indemnify the plaintiff to the KRA in respect of the unpaid and/or underpaid duties and taxes and whether the defendant, indebted to the plaintiff in the sum of Kshs.844,740/65 as set out in the plaint?

38. The plaintiff through unchallenging evidence of Mr. Martin Mbugua, **PW1**, has demonstrated that the demand for the total sum of Kshs.48,792,615 by **KRA** were made after a Customs Post Clearance Audit on account of falsified and understated custom values made by

the Defendant whilst providing customs clearing and freight forwarding services under the Agreement. The Plaintiff fully paid the said sum to avoid any enforcement mechanism by **KRA**.

39. Under the Agreement, the Plaintiff contracted the Defendant as its clearing agent with an obligation to use sound business practices and at all times comply with Kenyan laws regarding clearing of goods and other accepted and applicable standards. However, the Defendant failed to carry out its duties under the Contract and the Plaintiff is entitled to be indemnified for losses suffered. **Chitty's son Contracts, Sweet & Maxwell, Vol 2 (31st edition) at page 82** reads as follows:-

"Breaches of the Common law and also of the equitable duties may justify the dismissal of the agent, and also disentitle him to remuneration and/or indemnity....A Principal who is induced, by the negligence of his agent, to enter into an adventure from which loss ensues is entitled to recover from the agent the amount he has actually lost plus compensation for the loss of time."

40. On perusal of the agreement under clause 14, it expressly provides that the Defendant would indemnify the Plaintiff against any and all loss, claims, demands and expenses that the Plaintiff may suffer or incur as a result of inter alia:- the Defendant's willful or negligent acts or omissions in the performance of the contract and/or false claims submitted by the Defendant under the agreement or as a result of misrepresentations of fact or fraud by the Defendant.

41. In the learned treatise Halsbury's Laws of England (5th edition) Vol 49, para 1255 defines a contract of indemnity as "a contract by one party to keep the other harmless against loss." Clause 14 of the Agreement constitutes a contract of indemnity. Therefore, the Defendant is liable to indemnify the Plaintiff for the loss of Kshs.49, 798,615 paid by the Plaintiff to **KRA** in respect of the unpaid and/or underpaid duties and taxes.

42. **PW1** testified that in the demand letter to the Defendant dated 3rd June 2015 (at page 27 to 28 of the Plaintiff's Bundle of Documents), the Plaintiff demanded payment of *inter alia*:- Kshs.1,421,000/- and Kshs.1,467,776,57, in respect of monies advanced by the Plaintiff to the Defendant in respect of duties and taxes for each truck that were not remitted by the Defendant to **KRA** and a credit balance on the Plaintiff's account with the Defendant as at April 2015 for shipment not yet cleared and for shipment which was subsequently cancelled.

43. The plaintiff testified that the defendant made part payments in respect of the said sums and it was **PW1's** uncontroverted testimony that the Defendant is indebted to the Plaintiff in the sum of Kshs.844, 740/- (a copy of the statement of account evincing payments and the outstanding amount is at page 73 to 81 of the Plaintiff's Bundle of Documents). Therefore, the Plaintiff is entitled to payment of the said sum from the Defendant.

44. I have considered **PW1's** unchallenged evidence and I have no doubt that the plaintiff has proved its case on balance of probability against the defendant who deliberately failed to appear and give evidence controverting that of the plaintiff. I am satisfied the plaintiff is entitled to payment sought in the plaint.

C. Whether the plaintiff is entitled to general damages for breach of contract?

45. The plaintiff has demonstrated that the defendant breached the terms and conditions of the contract by its failure to remit customs duty to **KRA** as and when it became due and therefore falsifying documents to deceive the plaintiff. The plaintiff suffered loss and damages not only in its reputation amongst its customers and **KRA**, but was compelled to pay the sum of Kshs.48, 792,615 to avoid enforcement mechanism threatened by **KRA** and making payment twice and for payment which had not been anticipated causing the plaintiff to suffer substantial loss and damage to its business operations within the country.

46. In case of **Nakana Trading Company Ltd Vs Coffee Marketing Board (1990-1994) E.A 448:-**

"The general rule with regard to damages in breach of contract were set out in the often quoted case of Hadley Vs Baxendale [1854] 9 Exch 341 where the court said:

"Where two parties have made a contract which one of them had broken, the damages which the other party ought to receive in receipt of such breach of contract should be such as may fairly and reasonably be considered either naturally that is in accordance to the usual course of things from such a breach itself or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it."

47. In view of the above and having considered the nature of the agreement and the breach occasioned by the defendant and failure to redeem the plaintiff for the financial constraint it was faced with, I am satisfied the plaintiff is entitled to general damages, and in view of the nature of the claim and the amount the plaintiff had to pay to avoid the enforcement and keep its reputation, an award of general damages of Kshs.5 million would be appropriate.

48. The upshot is that the plaintiff case succeeds and I proceed to enter judgment for the plaintiff as follows:-

- a) **Kshs. 48,792,615 in respect of unpaid or underpaid duties and taxes to KRA.**
- b) **Kshs.844, 740/65 in respect of the defendant's indebtedness to the plaintiff as set out in paragraph 18 of the plaint.**
- c) **Kshs. 5 million General damages.**

d) Interest on (a) and (b) above at court rate from the date of filing suit till payment in full.

e) Costs of the suit.

Dated, signed and delivered at Nairobi this 25th day of **October, 2018.**

.....

J .A. MAKAU

JUDGE.