



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

HC.COMM. 19 OF 2009

MODERN HOLDINGS (E.A) LTD.....PLAINTIFF

VERSUS

KENYA PORT AUTHORITY.....DEFENDANT

J U D G E M E N T

Outline

1. On 29.04.2009 by a plaint dated 24/4/2009 and later amended on 13.10.2010, the plaintiff, a limited liability company registered in the Republic of Tanzania, filed the suit and sought judgement against the defendant claiming various declarations and specific sums making an aggregate of US\$ 24, 819,115.

2. The prayers were crafted and made out as follows:-

i). A declaration that the decision and the action of the defendant in refusing to clear and release the plaintiff's consignments was unlawful.

ii). A declaration that the plaintiff has discharged all its obligations to the defendant.

iii). A declaration that no further customs warehouse rent is payable to the defendant by the plaintiff on the fifteen (15) containers in their custody, whose contents and/or products have since expired.

iv). Damages for loss of the consignments through expiry

- US\$ 819,554

v). Damages for loss of profits for January to

June 2008

- US\$ 1,395,816

vi). Special damages

- US\$ 15,520,916

vii) . Interest on borrowed funds up to June 2008- US\$ 28,759

viii). Loss of profits for the remaining period of the sales and distribution agreement which

was to expire on the 31st day of December, 2010 at the rate of US\$ 232,636 per month for thirty (30) months from the 1st day of July, 2008

totalling to US\$ 6,979,080

ix). Expenditure on following up clearance and

Transport charges US\$ 75,000

TOTAL US\$24,819,115

x). General damages to be assessed by the court together with interest thereon at rates to be determined by the court.

xi). Interest on items(iv),(v), (vi),(vii), (viii) and (ix) herein above and/or interest on the decretal sum from the 1st day of July, 2008 the date of full payment at commercial rates and/or such rates as this Honourable court may deem fit.

xii). Any other relief that this Honourable court may deem fit to grant.

xiii). Costs of this suit be borne by the defendant in any event.

3. The gist of the plaintiff case is that it was the sole appointed distributor of what it calls 'high quality fruit juices and fresh water' in East Africa and that the distributorship was later extended to other African countries. The business was to be transacted by importation of the products from Dubai through the port of Mombasa. It is in the plaint pleaded that during the months of December 2007 and January 2008, the plaintiff imported the products in some 21 (twenty one) 40(forty) foot containers. To be specific the consignment arrived and were discharged at the port on the 9th, 30th, December 2007, 13th January 2008 and 14th January 2008.

4. The plaintiff pleads in the plaint that the defendant was by law under its creating statute section 12 as well as the East African Community Treaty, Article 93, and the East African community customs Management Act bound to create, foster and further a management and operating systems and environment that is efficient to enable sound economic development of the Region. The plaint however accuses and faults the Defendant for failure to meet the legal mandate in that expeditious removal of the goods from the defendants premises was made difficult by the infamous political turmoil Kenya experience following the disputed general elections of 2007. However, when the situation normalized and after there had been a recommendation for waiver of requisite taxes and duties by the parent ministry of the defendant. The plaintiff discovered that the cargo was not warehoused within the defendant's premises but at a third party's called MAKUPA TRANSIT SHADE who then gave him unreasonable and unrealizable conditions to clear the cargo within 3 days. It is the plaintiffs case that the condition was unreasonable and unrealizable because the way the containers were stored, it was very difficult to identify same and that due to that logistical problem by the transit shade, the time to clear the cargo ran out and the transit shade then demand the payment of the waived charges.

5. On its side, the defendant mounted a defense that can be summarized to the effect that; the plaintiff did not import the cargo for the disclosed customers, the fact that the plaintiff was never an importer of goods by virtue of the agreement dated 12/10/2006 or that the importation was transacted through the port of Mombasa. The defendant however admitted the obligation pleaded to be assigned to it by law except that it pleaded being a stranger to those obligations under the East African Community Treaty and the Customs Management Act.

6. The plaintiff claim in generally denied, the defendant denied having breached any of its mandates to the plaintiff and specifically denied that the post-election violence could have affected the clearance and transportation of imports goods to Tanzania as that route was not affect by the disturbance. In particular

the defendant pleaded that in transferring the cargo to Makupa Transit shade, it acted within its statutory mandate and that it not only transferred the plaintiffs goods but other persons' goods as well. On waiver of the due charges, defendant pleaded that it was not bound to abide by the recommendations by the parent ministry or the permanent secretary and that the plaintiff's decision to seek such waivers elsewhere than from the defendant was misguided and futile as the defendant is not subject to such interventions. Specific denial was made against the accusation of unlawful and unreasonable demand and that it was not responsible for the alleged losses to the plaintiff and that if the plaintiff was aggrieved by the actions of the plaintiff it ought to have sued the Makupa Transit Shade for the acts complained about.

7. On the shelf life of the goods and their expiry the defendant pleaded that the nature of the good was never brought to its attention and that if they expired then such fate was as a result and consequence of procrastination and through foot- dragging by the plaintiff.

8. In totality the defense filed denied all the allegation by the plaintiff, denies wrong doing by the defendant and blames any damage to the plaintiff on the plaintiff itself and avers that the suit was in contravention of sections 65 & 66 of the Kenya Ports Authority Act.

Evidence by the Plaintiff

9. To prove its case the plaintiff called a total of four (4) witnesses being, the managing director of the plaintiff PW1, directors of the clearing and Logistics Company contracted to clear the cargo, PW 2 & 3 and the Financial director of the plaintiff PW 4. The evidence tendered by the four witnesses was largely an adoption of the witness statements filed.

10. PW 1 introduced the plaintiffs case and went out to prove the plaintiff as being the sole distributor of products produced by a company known as MASAFI MINERAL WATER LLC based in Dubai to distribute its products initially within the East and Central African region and later after meeting targets the area was expanded to cover the other African countries.

11. In that capacity, the plaintiff did import 21 x 40 feet containers 10 of which there destined for Kenya, 10 were destined for Tanzania and one for Uganda. When the cargo landed at the port of Mombasa, there were political turmoil and therefore the cargo could not be cleared by the two firms the plaintiff had appointed.

12. Upon arrival of the cargo, a decision was made to start with the cargo for Kenyan market, for which taxes and port charges were paid but the containers were not available at the port having been transferred to MAKUPA TRANSIT SHADE LTD. At Makupa, additional port charges had been incurred, levied and demanded for which the plaintiff sought and obtained waiver of the charges of up to 80%.

13. According to the plaintiff Makupa demanded sums in excess of Kshs.500,000/- which he contested with the result that he was granted a waiver of 90% of the sum on condition that he removed the cargo within 3 days. In his evidence, the time given when looked at and applied to the logistical requirements, regard being had to the way the containers were arranged, the plaintiff could not manage to identify, carry out verification and remove all the container but only managed 6 out of the 21 containers. This, the witness said, was despite the fact that the plaintiff had organized and availed 9 lorries for the goods destined for Tanzania and 6 lorries for the goods destined for Kenya. At the lapse of the three days they were denied the right to uplift the containers as time granted had lapsed.

14. He attributed the inability to remove the containers from Makupa Transit shade to the poor arrangement of containers making identification and verification very difficult and lack of equipment unlike at Kenya Ports Authority where there existed adequate equipment and adequate infrastructure and arrangements to aid quick removal.

15. Having failed to remove his containers, the plaintiff asserted that he suffered damage and losses among them:-

- i). Loss of 15 x 40 containers worth US\$ 819,554.**
- ii). Loss of projected profits for the unexpired period of the contract US\$ 16,395,812.27**
- iii). Refund of Kshs.1,489,055 paid to Makupa transit shade contrary to 100% waiver on warehouse charges.**
- iv). Interests on borrowed funds upto 31.5.2013 US\$ 292,034.64.**
- v). Expenses on clearance, transport and accommodation US\$ 75,000.**
- vi). In the alternative to the foregoing claims, lost profits for the unexpired contract period US\$ 6,970,080.**
- vii). General damages for lost opportunity to make enhanced profits, renew sale and distribution agreement, loss of business reputation, cancellation of banking facilities, trauma due to threatened foreclosure and pecuniary embarrassment US\$ 7,500,000.**
- viii). Punitive damages as may be assessed by the court.**

16. By consent the parties had produced two bundles of documents filed by the plaintiff and dated 10/6/2013 and 14/08/2014. Those documents included the distribution agreement with Masafi Co. LLC, demand by financiers and that by Masafi's demand to utilize bank guarantee for failure to pay. The plaintiff was therefore compelled to borrow from one Arusha Club Savings and Credit Co-operative Society to pay Barclays Bank. The plaintiff further produced an audit report by Earnest and Young filed in court on the 18/8/2014 which sought to review an audit report by PWC produced by the defendant.

17. The three audit reports agree that some loss was suffered but there is no agreement on the figure. The bundle of documents dated 10/6/2013 and filed in court on 12/6/2013 was produced as exhibit P2 while the supplementary list of documents dated 14/8/2014 and filed in court on the 18/8/2014 was produced as exhibit P3 by consent of the parties. That was after the audit reports by Earnest and young had been produced as exhibit. P1.

18. On cross examination by Mr. Imende for the defendant, the witness confirmed that one of the container arrived in Mombasa in early December 2007 and therefore some three weeks prior to the post-election violence. It was a container destined for Uganda but was given a mistaken address for Tanzania in the Bill of lading which was prepared by the shipper and not the Defendant. To correct the bill of lading the plaintiff made some payment however no evidence was availed for such payment.

19. The witness however conceded that due to the post-election violence the port was congested and he expected to be told that the cargo had been moved. He was referred to documents in the defendant's bundle of documents which showed that a Notice was published in the Daily Nation but he pointed out that the Newspaper has no circulation in Tanzania.

20. He was also referred to a notice by the defendant to the effect that some goods had been moved to MAKUPA TRANSIT SHADE LTD but pointed out that he did not see the Notices because he was in Tanzania and not Kenya.

21. When referred to the distribution agreement with Masafi, the witness conceded that the agreement was signed one day before the plaintiff was incorporated in Tanzania and long before it was incorporated in Kenya in 2007.

22. On his prayers in the plaint for losses incurred and claimed the witness said in cross examination that he was abandoning his claim for US\$ 24,819,115 and settling for US\$ 9,118,475 based on the opinion of the experts Earnest & Young. On the value of the containers he said that the figure US\$ 819,554 was the sale price for the goods based on the invoices the plaintiff had issued to its customers.

23. On why he did not pay the sum demanded by Ms. Makupa Transit shade after the lapse of 3 days, he said that it was difficult to trace the containers hence he saw no need to pay as even the cargo meant for domestic use in Kenya for which payment had been made could not be traced.

24. Additionally, the witness said that he also failed to take the goods because of the reduced shelf life as for example in Tanzania the goods could not gain entry unless the outstanding shelf life was at least 75%. On interest paid to Arusha Club he said he was not claiming same having been excluded by the experts.

25. On re-examination, the witness said that by the time the distribution agreement was signed the process of incorporating the plaintiff had kicked off, but the incorporation certificate had not been issued and that he deemed incorporation done after payment of requisite fees.

26. On appraisal for the distribution contract, the witness said and referred the court to page 26 and 27 of the Ex.4 page 2 to show that the territories were increased from 7 to 20 as a sign of the plaintiff's success in the business.

27. On the delay to clear the first container to arrive, the witness said that he had 21 days to clear the container but the same could not be traced despite payment of requisite duties. He opted to rely on the report by Earnest and young rather than the Report by the plaintiffs internal auditors.

28. Then came PW 2, was the general manager of NIBAL FREIGHTERS LTD, the clearance agent contracted to clear part of the cargo. His evidence was largely on process involved in clearing cargo at the port. He said that taxes are payable upon assessment by the Kenya Revenue Authority for the domestic cargo. Once the taxes are paid the shipping line then raises their local charges which must be paid before they can issue a delivery order to enable the processing by KRA and calculation of port charges.

29. The witness referred the court to the plaintiff exhibits at pages 66-80 which to him was to the effect that the cargo was to be picked at KPA yard. His evidence was that he paid for the invoiced charges believing he cargo was at the defendants yard only to be told that the cargo was at Makupa Transit shade where he was also invoiced additional storage charges over and above the charges by KPA. When he contacted PW 1, it was agreed that the plaintiff applies for waiver of the charges. Pursuant to that agreement an application was made and waiver granted by KPA but Makupa only agreed to waiver of upto 90% on condition that the cargo be uplifted within 3 days. The witness was affirmative that in spite of payment it was impossible to physically locate the containers due to the congestion at the yard and the way the containers were stored. The witness added that the two containers remained at the port were easily cleared but not those at Makupa despite the fact that there were trucks ready for transport.

30. On cross examination, the witness confirmed that there was evidence of recommendation for waiver of demurrage charges. PW 2 was instructed to clear 13 containers and confirmed that these containers arrived at the port on 13th & 14th January 2008. He said that during that month he went to the port almost on a daily basis but did not see any notice of removal of the containers to Makupa.

31. The witness went on to say that KPA made it conditional that Makupa had to be paid first before KPA could accept payment of their charges. He went on to confirm that KPA only charges after a container stays at the port for more than 21 days. In his evidence the congestion at the port was caused by post-election violence which made transport to most parts of the country paralysed.

32. In re-examination, the witness said the Notice was never addressed to anybody and that in spite of the Notice two containers never left the defendant's yard and were cleared with ease.

33. PW 3 Kenneth Ndunda Ndeto was another clearing agent and gave evidence as the Manager of modern logistics ltd who was instructed by the plaintiff, during the month of December 2007, to clear some of the suit cargo. He said when he went to KPA to clear the cargo after correcting an error in one of the bills of lading and payment of duties he was unable to clear the containers because he was told at KPA that the containers had been transferred to Makupa transit shade. One particular container meant to

be delivered to BOLAX ENTERPRISES LTD, KAMPALA, UGANDA was paid for in January 2008 but could not be traced both at the defendants yard as well as at Makupa. He then sought to clear three(3) containers which arrived on 30/12/2007 and whose duty was paid on the understanding that the same were stored at KPA yard.

34. However the operations at the port were disrupted by the political turmoil out of the disputed elections and even accessing the port was difficult. It was therefore only towards the end of February 2008 that he was able to lodge the documents. At that time the plaintiff made a consolidated request for waiver for all the pending containers and in fact obtained a recommendation for waiver on the 19/3/2008. On the strength of the letter Makupa was contacted on phone and PW 3 directed there for purposes of clearing the cargo. At Makupa he was given an invoice with waiver of storage charges at 90%. He was however totally unable to locate the containers at Makupa and he said as at the date of testifying he was not able to say where the containers were. To him the cause for failure to locate the containers was due to change of location without Notice and the haphazard way in which the containers were kept at Makupa.

35. In cross examination by the defendant, the witness said that the first container to be discharged delayed clearance due to wrong entry on the manifest caused by the shipping line. He went on to say that the documents filed gave different reasons for delay ranging from error by the shipping line to delay in bank transfers and that KPA gave extensions including extension of time within which to pay the charges. The witness in conclusion of cross examination said that the taxes due on containers destined for Kenya were paid on 29/2/2008 and that for the transit cargo bonds were executed.

36. In re-examination, the witness said that he was totally unable to locate the containers at Makupa Transit shade and therefore was reluctant to pay charges due to Makupa for containers which could not be traced and verified by the government agencies.

37. PW 4 was a director of the plaintiff in charge of finance. His evidence was largely to give the values of the cargo sued upon, to give the expected profit margins and the workings on the projected profits for the life of the distribution agreement and therefore the losses incurred.

38. In his view, the two audit firms contracted by either party also confirmed losses due to the matters complained about in this suit. He gave the calculation of projected trading results for the period July 2008 to December 2008 at 1,634,088.99 US dollar in profits.

39. On cross examination by the defense, he conceded that his workings exceeded the workings given by the plaintiff's auditors Earnest and Young for the two scenarios the auditors considered and that he did not factor in the operation costs of the plaintiff.

His figures represented gross profits. He reiterated his written statement that the plaintiff had suffered loss and damages in the various sums under different heads and expressed in US dollars including an alternative prayer for loss projected profits in the sum of US\$ 6,979,080.

40. On the foundation and basis of his projections for the profits, he was questioned about the authenticity of the audit report preferred by Ms. G. Washington Company, a firm said to have been registered in the year 2014. To that anomaly the witness said he was aware that in Tanzania auditors are registered annually and that; the proprietor of the firm was personally known to the witness having worked under him and that he was registered and authorized to carry out business in the year 2007.

41. In re-examination, the witness clarified that the plaintiff was not responsible for the transport of the cargo from the port of Mombasa and that his instructions to Earnest & Young was for the purposes of the said firm of auditor reviewing the report by PWC. When asked by the court the accuracy of seeking gross profits without regard to overheads the witness said that it would mean that the plaintiff get paid for the expenses it would have incurred to carry out its business.

With that evidence the plaintiff closed its case having called 4 witnesses.

42. For the defendant, 2 witnesses were called to advance the defense that no liability attached on the defendant for reasons that the alleged losses incurred by the plaintiff were never resultant from any breaches on the defendant's statutory obligations. The line taken by the defense was that under the Kenya Ports Authority Act, the defendant was a Stevedorer obligated to handle containers brought to the port and facilitate their evacuation with authority to engage third parties to assist in the discharge of such statutory obligations. It was sought by evidence to prove that the plaintiffs container landed at the port at the time when there was congestion occasioned by the post-election violence and failure by cargo owner to evacuate the cargo within the stipulated time.

43. To alleviate congestion; the defendant in conjunction with KRA engaged MAKUPA transit shade to store long stay containers which had been at the port for longer than 21 days. The plaintiffs containers were subject to such arrangement and were moved to Makupa Transit shade pursuant to a public Notice issued in the Daily Nation and Kenya Gazette.

44. The defendant sought to prove that there was delay in clearing the cargo by the plaintiff and therefore the defendant was not liable.

45. On the quantification of the plaintiffs claim, the defendant relied upon the two audit reports by PWC and termed the claim as exaggerated. The evidence by the two witnesses on behalf of the defendant was briefly as follows:-

46. DW I PATRICK MUTHAMA MAKAU is the principal operations of the defendant having worked there for 23 years. In the year 2008 his duties entailed overseeing shore operations to include documentation and clearance of cargo, claims arising out of such operation, billing and handling of empty containers. In his evidence there was congestion at the port between December 2007 and March 2008 as most clearing and forwarding agents did not come forward to clear their cargo. As a result the defendant made arrangements for the long stay containers to be shifted to Makupa transit shade, itself a licensed container Freight station.

47. His evidence was that for the defendant to move the cargo it would prepare a document called INTERCHANGE in triplicate. The three copies were made with the intention that, the defendant, Makupa and the clearing agent, each get a copy. The witness directed court to the gazettement of Makupa to handle the overstayed cargo, a notice for the removal and a letter by Makupa agreeing to accept the cargo but on condition that it collects storage charges directly from the agents. He also stressed the process adopted by the defendant for such transfer. That procedure makes it mandatory for KPA to prepare the document called INTERCHANGE in 3 copies and further that KPA would provide equipment for transfer and offloading at Makupa at designated area within Makupa Transit Shade. On cross examination, the witness conceded that the defendant then fell under the Ministry of transport and that the permanent secretary in-charge had recommended waiver of port charges.

48. He however denied personal knowledge of the plaintiff's containers and how they were transferred to Makupa and that he was aware that the plaintiff was a Tanzanian company. He was equally unaware of the number of the containers which were for transit and how many were for domestic use. He went on to say that he did not have evidence on when and which containers were transferred to Makupa nor did he have evidence that the interchange was served upon the plaintiff's agent.

49. Then came Rose Atieno Nyalwal who introduced herself as Assistant Superintendent Operations with 20 years work experience with the defendant. Her evidence was largely on how waiver is applied for and considered. She was consistent that there are committees of the defendant who consider the waiver and not the parent ministry. In totality the witness underscored the fact that the requests for waiver were grounded on various reasons and that none of the reasons was attributable to the defendant. On cross examination, the witness conceded having not personally dealt with the 4 containers or any of them. On his evidence that the applications for waiver were made late, he stated that there was no time limit within which to apply for the waiver. When shown the letter dated 18/3/2008, she conceded that the managing director of the defendant is answerable to the ministry of transport but insisted that the first waiver was applied for on 29/4/2008. She also said that at some stage the suit containers were removed to Makupa

but was not able to say when and how many were removed as she did not deal personally.

50. On port charges, the witness said that there is a standard period of seven days which can be extended to 21 days but she conceded that there was no evidence that the agreement between Makupa and the defendant incorporated the plaintiff or that it was even brought to the attention of the plaintiff.

51. With that evidence the defendant had to close its case after an application to call a third witness who had not filed a statement was declined by the court.

Issues analysis and determination

52. Having rehearsed the evidence above, read the submissions offered by both parties and the law cited as well as the issues drawn by the parties, I have isolated the following issues as falling for determination by the court. they are largely as framed by the plaintiff. However I will redraw the issues into five(5) broad issues as follows:-

i). As a Stevedorer, did the defendant discharge its mandate to the plaintiff under the statute and at all?

ii). Were the suite containers ever transferred to the Makupa transit yard in the usual and disclosed manner?

iii). If (ii) above is answered in the negative; has the plaintiff suffered any damages as a consequence?

iv). If (iii) above is answered in the affirmative, what is the heads of such damages and the quantum thereof?

v) What orders are desirable on costs?

53. Prior to consideration on the isolated issues, it is important to point out that the defendant pleaded that the plaintiffs suit was bad for failure to comply with sections 65 and order 4 Rule 1(1) of Civil Procedure Rules. To the court that pleading questions the propriety of the suit and ought to be dealt with preliminarily and before delving into the merits.

Section 65 of Kenya Ports Authority Act provides:

65. Notice of Claim

(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. (emphasis provided)

[Order 4, rule 1 sub-rule f.]

(1). The plaint shall contain the following particulars:-

a). ...

b). An averment that there is no other suit pending, and that there have been no previous proceedings, in any court between the plaintiff and the defendant over the same subject matter and that the cause of action relates to the plaintiff named in the plaint.

54. Although this point was pleaded no evidence was led on it nor were any passionate submissions offered on the same, and it would appear that the defendant, so to speak, just threw the objection at the court. However, these are matter of law that i am bound to determine on the facts availed.

From the bundles of documents produced by consent, there is at page 47 of the plaintiffs list of documents dated 10/6/2013, a letter by S. Musalia Mwenesi Advocate dated the 11/7/2008 and giving a demand to the managing director. The evidence on arrival of the goods is that the cargo was received on various dates between 9th December 2007 and 14th January 2008. There is equally a common position that an importer has a grace period of 21 days to enter the goods. If the delivery sued upon was a series of transaction forming a whole then I find that the period of six (6) month from 14/1/2008 ended on the 13/7/2008 and not earlier. If that be correct, and if the letter dated 11/7/2008 suffices as a demand contemplated under the statute then, I hold the view and find that both objections to the validity of the suit lack merit.

55. I have equally sought understand paragraph 45 of the plaint and I see no basis to allege that the plaint fails to comply with the requirements of order 4 Rule 1(1) f. I now go to the merits;

a). Did the defendants as a Stevedorer discharge its mandate to the plaintiff under the statute and at all?

56. The powers of the defendant as a statutory body is enacted under section 12 of the Kenya Port Authority Act. Section 12(1) e and n (ii) are of specific application for the dispute in this matter. The law in those provisions is as follows:-

Section 12(1): Powers of the Authority as a statutory body

(1). The Authority shall have power –

(a). To maintain, operate, improve and regulate the ports set out in the Second Schedule;

(b). To construct, operate and maintain beacons and other navigational aids;

(c). To construct new ports;

(d). To carry on the business of stevedore, wharfinger or lighterman;

(e). 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;

(f). To the extent determined by the Minister, to act as carriers of goods or passengers by land or sea;

(g). To consign goods on behalf of other persons to any places whether within Kenya or elsewhere;

(h). To provide such amenities or facilities for persons making use of the services performed or the facilities provided by the Authority as may appear to the Board necessary or desirable

Section 12 (2) n to enter into agreements with any person—

i). For the supply, construction, manufacture, maintenance or repair by that person of any property, movable or immovable, necessary or desirable for the purposes of the Authority;

ii). For the performance or provision by that person of any of the services or the facilities which may be performed or provided by the Authority;

iii). For the payment, collection or apportionment of any fares, rates charges or other receipts arising out of the performance or the provision by that person of any such services or facilities and, for such purposes, to finance or assist in financing the activities of the person whether by way of loan, the holding of stocks, shares or securities, the guaranteeing of interest or the retention of any stocks, shares or securities or otherwise.

57. To this court the plaintiffs contention that the defendant erred in transferring the cargo to Makupa may thus not be right. The statute clearly mandates it do just that however the law is that the purpose of contracting Makupa was for the purposes of performing the services the defendant is by law obligated to perform.

58. To this court, the arrangement between the defendant and Makupa must be seen as that between a principal and a delegate. The delegate performs the acts on behalf of the principle. No wonder the defendant set out the terms of that engagement by the "OPERATING PROCEDURES FOR LONG STAY CARGO"

59. Of note in those procedure is the clause headed "Transfer" which mandated the defendant to prepare an inventory of all long stay containers and and to deposit same at designated area within Makupa Transit shade and further that handing over would be by an interchange filled in triplicate with a copy of the interchange being availed to the customer as evidence of transfer. The plaintiffs witnesses 1, 2 & 3 having led evidence that the containers were not able to be identified at Makupa transit shade and further that 2 of them were traced to the defendants own yard, the evidentiary burden then shifted to the defendant to prove that the containers were indeed shifted. This with the defendants own set procedures and evidence by DW 1 that it was imperative to prepare the document called interchange and inventory of all transferred containers, put an obligation or at least an expectation that the defendant would lead evidence on when and which containers were transferred to Makupa.

60. This *onus* was, unfortunately not met by the defendant a development that leads this court to draw the reference that had the inventory and interchange been produced they would have been adverse to the Defendants case. I make such inference and find that the defendant failed to prove that the suit containers were transferred to Makupa on account of overstay.

61. I have equally taken note that the decision to transfer the overstay containers was made on or about 4/1/2008. By that time only one container had landed at the port on 9/12/2007 and had overstayed by some 5-6 days. The rest of the container according to the evidence of both sides landed on 30th December 2007, 13th January and 14th January 2008. To the court it was important that the inventory and interchange prepared by the defendant was produced so that other than proving that the containers were transferred, when they were transferee, if indeed transferred, and whether they had overstayed.

62. I find that the parties being in agreement that the plaintiffs 21 containers landed at the defendants premises, the defendant had the primary duty to warehouse the goods in the manner it obligated to be reasonable and even where the goods were transferred it was bound to oversee that to the premises they were so transferred they were so warehoused in a manner that was facilitative of their clearances so that when demanded by the owner they would be readily available.

63. It was in the evidence of PW 1, PW 2 & PW 3 that the containers were haphazardly kept at Makupa that it was very difficult to locate them to enable the procedure of verification be conducted. That evidence was never controverted by the defendant's witnesses who said they did not personally deal with the goods.

64. The fact that there was no evidence when the containers were transferred, the inference I have drawn and that those goods were badly kept to make it difficult for location, identification and verification by the plaintiff, I find that the defendant did not discharge his contractual and legal obligation to the plaintiff. I equally find that the failure by the defendant to serve upon the plaintiff a Notice Of Removal Of The Cargo To Makupa was a glaring failure on its statutory duty under both Kenyan law and the East African Community statutes

65. It has been submitted that Section 22 of Cap 391 limits the liability of the defendant to only instances where the loss is occasioned by want of reasonable foresight and care on the part of the defendant. I find that the defendant was under the statute being a warehouseman bound to the plaintiff to account for the goods by being able to locate them as and when needed. I find the defendant failed in his duty of care and find it liable for the loss of the plaintiff 15 containers. This determination settles the first 3 issues with the result that by virtue of liability the defendant is liable to the plaintiff for the loss of that cargo.

a. What compensation or damages is the plaintiff entitled to?

66. The plaintiff case and evidence was that the cargo was imported pursuant to a distribution agreement designed to run up to the year 2010 with an option to renew.

67. The defendant challenged the plaintiff's right to benefit from the agreement with MASAFI CO. LLC on the basis that the agreement was entered into prior to the plaintiff being incorporated. To this court, the capacity of the plaintiff to enter and benefit from the agreement is not available to the defendant as a defense. The basic rule on privity of contracts is that only a party to a contract can seek to rely on its terms and effects. I therefore hold that the defendant is not privy to the agreement it seeks to impugn and therefore the authenticity or veracity of that agreement is not available to it as a Defense. What is important on the relationship between the defendant and plaintiff in this matter is that the cargo was offloaded at the defendant's premises but only 6(six) out of 21(twenty one) boxes could be traced and uplifted by the plaintiff. The rest 15 could not be traced and have not been traced to date. It could have interested the court if the defendant led evidence that the cargo is available and has since been traced. No such evidence was forthcoming from its end.

68. On damages and heads upon which the plaintiff may be entitled, I hesitate not in saying that the plaintiff is entitled to not only the value of its cargo but also for the losses incurred by virtue of the actions I have adjudged to make the defendant liable to the plaintiff.

a. Loss consignment

69. With the use of invoices to the customers the plaintiff was to supply the goods, the value is disclosed as US\$ 819,554. That is the sum the plaintiff was entitled to receive upon the delivery of the goods, with the aborted delivery the sum was totally lost. I do not agree that the plaintiff need to show the value at which the goods were brought as the value and loss incurred. I take it that to the plaintiff the cargo was a merchandise which in the plaintiff's evidence was to be picked by the consignees from the port once cleared and therefore get payment for the sale price. This sum is not disputed as the value of the goods and I therefore award it to the plaintiff. In making this award, I have not followed the sum proposed by the two experts because they don't justify why the plaintiff is only entitled to cost of purchase. Under the head loss of consignment, I award to the plaintiff US \$ 819,554

b. Loss of Profits for the contract period

70. Even prior to the parties leading evidence, it was appreciated that it was prudent to get a professional opinion on what possible losses could result if the defendant was to be held liable. It is on record that on the 6/5/2014 the defendant's counsel sought time to enable it seek and procure and file forensic audit report as well as witness statements. Indeed the court reluctantly granted the adjournment with the consequence that a forensic audit report by one Mr. Muniu Thoiti of Price Waterhouse Coopers (PWC) was filed in court on the 23/6/2014. That report analyzed the claim and adopted two scenarios for assessing the losses incurred. In the report, it is said that the author was not provided with prices per case but instead provided with prices per container and historical information of the 2007 sales. He thus used such data to come to average sales less than the contractual targets.

For scenario one (i) the report pegs the loss at US\$ 1,355,475. However, for scenario 2 in which he assumes sale by the plaintiff on the targeted turnover, without regard to the added territory, and comes with a projected loss of US\$ 2,046,109.

Upon service with that report the plaintiff equally commissioned a forensic audit report by Earnest & Young (EY) which in the words of PW 4, was to review the report by PWC. That report was filed in court on the 21/8/2014 in the supplementary list of documents dated 14/8/2014. That report discounts the basis of the scenario 1 in PWC's report as having been in disregard to the reported sale of 408,000/- cases in the audited books of the plaintiff for the year 2007.

71. The report equally points out that the GDP rates used by PWC was at variance with those reported by Kenya National Bureau of Statistics and therefore could have imported an erroneous conclusion (see clause 4.31). The report further adopts two scenarios for the analysis and on review of the documents including the PWC report comes with a figures of US\$ 4,698,932 and 8,296,536 for the two scenarios respectively. The two scenarios by the report are based on the initial sales territory and increased territory. I consider the report by E.Y as a critique to the PWC report because upon it being filed and served upon the defendant, a rejoinder was filed on the 13/2/2015. At clause 1.6 of the rejoinder, the report says it was intended to provide a critical review of the audit reports by the plaintiff to ascertain the accuracies and test the experts assumption. However, the letter forwarding report make an initial disclaimer that **"it did not constitute an examination or a review in accordance with generally accepted auditing standards or attestation standards"**

72. I considering the two reports by PWC I will take note of that caveat appearing in both reports by PWC. The last report however varies to a small extent for the first report. I have taken the three reports into consideration as expert reports and in line with the provisions of section 48 of the evidence Act. They are and must remain opinions and can only persuade the court but are never binding upon it. That is not to say that I doubt the expertise of the authors. Indeed the authors are demonstrated to be quite skilled in their respective fields. What however concerns me is the extent of disagreement on the calculation of the sum described as loss. I would take it that both were carrying out definite instructions from the two rival parties to the dispute. That difference of about US\$ 6,000,000 would have to be resolved by the court. In seeking to resolve the difference I am bound to consider which of the two reports persuade me most *see Davei vs Edinburh Magistrates [1933] SC 34*.

73. Having said that I have read both reports, I consider that the report by E&Y is more convincing to this court. More convincing because it has discounted and pointed out errors in the report by PWC. I find that the loss of projected profits suffered by the plaintiff for the period 2008-2010 is as calculated by the plaintiffs expert. For that reason I award to the plaintiff the sum of US\$ 8,296,536. I have adopted scenario B by E & Y because the evidence that the territory was extended to include some other 12 additional countries in Africa was never controverted.

c. Loss on following clearance and transport charges

74. Other than the unanimity by the two experts that the plaintiff incurred the sum of US\$ 71,000 under this heading as special damages, no specific proof was availed. The 1st plaintiffs witness however gave evidence that is a Tanzanian and the number of days he stayed in Kenya. If the correspondence and acknowledged meetings is anything to go by, then some costs must have been incurred by the plaintiff. Since the expert reports prepared by both sides agree on a figure and the said reports were produced by the parties by consent, I award the sum of this at US\$ 71,000.

d. Punitive/Aggravated damages

75. These damages at large and falls for the assessment by the court if certain thresholds are met. The thresholds are that aggravated damages are only available against a defendant who acts out of improper motive like being accentuated by malice like in cases of defamation, a defendant insisting on a defense of justification or outright refusal to apologise. Having listened to the evidence by both sides and read the pleadings filed, I am not convinced that any improper motive was proved or alleged against the defendant so as to attract aggravated damages. In *John vs MG Ltd* cited with approval in *Ken Odondi 8 2 others vs Standard Ltd [2013] eKLR*. the law was set in the following words:-

"Exemplary damages on the other hand had gone beyond compensation and are meant to

“punish” the defendant. Aggravated damages will be ordered against a defendant who acts out of improper motive e.g where it is attracted by malice; insistence on a flurry defence of justification or failure to apologize”.

The payer for aggravated damages fails just like the prayer for Kshs.5, 000,000 general damages for loss of option to renew the distribution. I hold the view that the plaintiff has been adequately compensated by the awards already made.

e. Conclusion and summary

76. Having found that the defendant was liable to the plaintiff in the manner it handled the plaintiff’s cargo in the containers leading to the loss, the summary of award is as follows:-

a). Loss of consignment	-	US\$ 819,554
b). Loss of profit for the contract period	-	US\$ 8,296,536
c). Loss on following clearance and transport charges	-	<u>US\$ 71,000</u>
Total		US\$ 9,187,090
		=====

The sum attracts interest at court rates from the date of filing the suit till payment in full.

I also award the costs of the suit to the plaintiff.

Dated and delivered at Mombasa this **19th** day of **September 2016**.

P.J.O. OTIENO

JUDGE