



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
CIVIL SUIT NO. 80 OF 2001

KENYA MUSLIM CHARITABLE SOCIETYPLAINTIFF

VERSUS

KENYA REVENUE AUTHORITY.....DEFENDANT

J U D G M E N T

1 KENYA MUSLIM CHARITABLE SOCIETY, the plaintiff is a registered Non-Governmental Organization. KENYA REVENUE AUTHORITY (KRA), the defendant, operates under the supervision of the minister of Finance as an agency of the Kenya government for the collection and receipt of revenue.

2 The plaintiff's claim against the defendant is for Ksh 98,850,000 as special damages for loss of value of consignment of 32,410 bags of rice whose total value was pleaded as Ksh 98,850,000; and a claim for refund of Ksh 12,259,064 being the tax paid by the plaintiff for rice not released to the plaintiff' and for exemplary and punitive damages.

BACK GROUND.

3 The plaintiff on 19th November 1998 obtained from the minister of finance exemption from paying custom and excise duty and value added tax. (V.A.T) in respect of 6,000 metric tons (MTN) OF RICE, 2,000 MTN of cooking oil and 1,000 MTN of powder milk. That food stuff was to be donated to the plaintiff by LA-HILAL AL KHAYR of united Emirates. The food was to be distributed by the plaintiff free of charge to the poor and needy in the North Eastern province of Kenya. The exemption and according to the minister's letter, was granted on condition that the plaintiff would account to the commissioner of customs and excise the distribution of the food free of charge. That condition was in compliance with the provisions of Third Schedule, Part A, item 12(1) (b) of the custom and Excise Act. In part that provision exempts from tax goods imported by a charitable organization for free distribution to the poor and needy person.

4 On obtaining that exemption the plaintiff imported 1461 MTN of rice in January 1999 being the plaintiff's first consignment.

5 After that importation and its clearance freed of duty the ministry of finance by its letter dated 2nd February 1999, addressed to commissioner of customs and excise stated thus:

**RE: COLLECTION OF DUTY ON PREVIOUSLY EXEMPTED IMPORTD RICE-
M/S KENAY MUSLIM CHARITABLE SOCIETY.**

On or around 14th November, M/s Kenya Muslim Charitable Society were exempted duty on imported rice said to have ben for charitable distribution.

Information received is to the effect that, the rice is being sold in the domestic market by the clearing agents M/s Habo Agencies. This particular agent has been involved in some questionable deals in the past. E.g Childcare international and they should be tamed.

In view of the disclosure of sale of the rice, immediate action should be taken to have duties collected.

E.M GITHAE

For: PERMANENT SECRETARY/TREASURY

Cc. Commissioner –General

Kenya Revenue Authority

NAIROBI

6 Following that letter the ministry of finance by its letter dated 3rd June 1999 addressed to the commissioner of customs and excise writing in *respect of the letter of exemption of tax to the plaintiff stated:*

“The minister of Finance has instructed that the exemption letter in question be revoked. You may therefore go ahead and demand payment of the waived customs duties and VAT from those concerned.....”

7 On 16th June 1999 the defendant wrote to Habo Agencies Limited, who were the plaintiff’s clearing agent in respect to the first consignment and informed it that the plaintiff’s exemption had been revoked and demanded duty be paid of Ksh 21,643,019 in respect to the first consignment, that is, the already imported rice being 1461 MTN. The same information was communicated to the plaintiff by the defendant by letter dated 6th July 1999.

8 The plaintiff had by then imported further foodstuff the second consignment which indeed is the subject of this case. As per the evidence of Dw1 Jeremiah K Mailutha, a former employee of the defendant, the plaintiff failed to ‘enter and declare’ (which I believe in plain man’s language means they failed to clear the second consignment) within the period stipulated by Law and that second consignment was placed in the customs warehouse. Some of that second consignment was placed in the warehouse on 2nd, and some on 12th August and other on 13th September 1999.

9 The second consignment accumulated warehouse rent and the plaintiff by their letter dated 30th June, 16th August and 14th September 1999 sought from the ministry of finance waiver of that warehouse rent. Ministry of finance by its letter dated 12th November 1999 granted the plaintiff their request and the total custom warehouse rent accumulated was entirely waived.

10 Following that waiver the plaintiff removed from port on 25th November 1999, 76000 bags of rice; on 29th December 1999, 5,640 bags of rice’ and on 26th January 2000, 1,350 bags of rice.

11 There were other bags of rice not cleared from the port by the plaintiff in respect of the second consignment. The rice later deteriorated. The plaintiff by its letter to the defendant dated 9th February 2000 acknowledge as stated in the previous paragraph of this judgment that following the waiver of warehouse rent they had only cleared some of the second consignment by way of import entry numbers 3179, 3253 and 2829. By that letter while acknowledging that ministry of health had found the rice not fit

for human consumption they further made the following request.

We are requesting you to allow us collect balance of the consignment as we have ready buyers willing to buy the consignment a animal feed. We are willing to pay the duties of the same if given chance. Lastly note that the consignment has been lying at port for quite a long period now and The Senior Assistance commissioner has issued directive for it to vacate the warehouse for other use.

12 That rice in the second consignment which was found not to be fit for human consumption forms the crux of this suit.

13 Although the parties pleadings are convoluted particularly because of the many amendments they have gone through, the issues that that I discern requiring my deliberation are as follows:

- a) Did the defendant maliciously cause the revocation of the exemption granted to the plaintiff?
- b) did the plaintiff s inform the defendant that it was ready and willing to pay tax and VAT when the exemption was revoked?
- c) If (a) and (b) are in the affirmative, what quantity of rice which is the subject of this suit?
- d) Did the plaintiff inform the defendant to provide hygienic storage of the rice and if so whose responsibility was it to ensure the rice was stored in hygienic place?
- (e) If (d) is in the affirmative what loss if any did plaintiff suffer and who in responsible for such loss and has that loss been proved?
- f) Did plaintiff pay and if so when did it pay the import duty of Ksh 21,219,497?
- g) Has plaintiff proved its claim for special damages?
- h) Did defendant maliciously refuse to release the rice as animal feed after plaintiff offered to pay the duty?"
- i) If (h) is in the affirmative was defendant's action high handedness or actuated by malice?

14 Issue (a) above, is really responded to by the plaintiff's own further amended plaint at paragraph 13. In that paragraph the plaintiff pleaded:

The ministry of finance on its letter of 3.6.1999 instructed the defendant that it must revoke the letter of exemption given to the plaintiffs and further advised that the defendant may go ahead and demand payment of the customs duties and VAT from the plaintiffs.

15 In that paragraph the plaintiff correctly stated that it was the ministry of finance that instructed the defendant to withdraw the plaintiff's exemption to pay duty and taxes. That being so, and without further ado, I do find that the defendant did not cause the revocation of the plaintiffs exemption. There was no evidence adduced which remotely showed that the defendant, at all, revoked or influenced the revocation of plaintiff's exemption, maliciously or otherwise. It is for that reason that in regard to issue (a) I find in the negative.

16 The plaintiff according to issue (b) pleaded that once the exemption was revoked it was ready to pay the taxes due to the second consignment of rice yet that the defendant failed to release the rice. To support that contention pw2 MOHMAMED SHARIF ADBULAHI stated at cross examination that indeed payments were effected for that consignment of rice on 12th and 25th November 1999.

17 The documents in the plaintiff's bundle being receipt Misc. Receipt No. 044434 dated 25th

November 1999 for Ksh 4,270,000 and receipt No. 053075 dated 29th December 1999, and receipt No 059531 (its date is not clear) for Ksh 1,095,890 related to rice that was released to the plaintiff and for sometime stored at Benrick warehouse. The rice at Benrick warehouse was the subject of Mombasa HCCC No. 158 of 2000 which after the Ruling on the interlocutory application was settled. That is confirmed by the affidavit of ABDULLAHI AHMED UYSSUF, a representative of the plaintiff who swore the affidavit in Mombasa HCCC No. 158 of 200. He swore as follows:

That sometimes last year the plaintiff imported various consignment of 50 Kgs long Pakistan rice and in particular on 30th January 1999 we imported 12 containers X20 of the said rice through bill of Landing No AHB0068339 annexed and marked AAY 1 is a copy of the said bill of landing.

That the said 12X20 containers were cleared through customs entry No 3179 attracting a revenue of Ksh 4,763,090 paid through receipt No 053075 annexed and marked AAY2 is a copy of the entry and revenue receipt.

That we also imported 3 X20 containers which was cleared through entry No 2829 and a sum of Ksh 1,095,890 was paid by us as a revenue through receipt No. 059531, annexed and marked AAY3 is a copy of the bill of landing, customs entry and payment receipt.

That we confirm having imported another consignment of 4125 bags through customs entry No 3253 dated 23 November 1999 and in consideration for its clearance we paid a sum of ksh 4,2270,607 as due and payable revenue to the Kenya Revenue Authority annexed and marked AAY4 is a copy of the entry and Kenya revenue Authority receipt.

That as a result and inconsequence of the clearance of the said consignment from the port through our clearing agent, we stored the same at Benvick warehousing ltd for storage and awaiting the business to improve.

18 Apart from the payments stated in the paragraphs above of the affidavit of Mr. Yussuf I could not find any other which showed that the plaintiff immediately the revocation was communicated was ready to pay the duty for the rice that was still held by the defendant. That is the rice of second consignment. The revocation, it will be recalled, was communicated to the plaintiff's clearing agent on 16th June 1999. The plaintiff's by their letter addressed to ministry of finance dated 14th September 1999 were seeking time to fund raise to enable them pay duty and taxes.

19 In respect to issue (b) I find in the negative.

20 Issue (c) requires determination of the quantity of rice to which this claim relates. Even though I have found in respect of issues (a) and (c) in the negative, and ought to therefor not proceed to determine the quantity of rice as required under issue (c), I will still consider this issue because the quantity of rice will need to be determined if there is a finding that the defendant caused the loss of that rice.

21 This case was started on 28th November 2012 before justice Ouna (as he then was, now retired). It was further heard by Justice Sergon, and later justice Hohamed Ibrahim (as he then was, now a judge of the Supreme Court), before my taking over the hearing on 1st April 2014.

22 Before Justice Ouna Pw1 stated in examination in chief that the plaintiff's claim was for ksh 40,990,000. He did state how many bags of rice this value represented.

23 Pw 2, before Justice Sergon, stated that this case related to 20840 bags of rice.

24 Before Justice Ibrahim Pw 2 stated:

“The balance of 1,620 metric tones of rice was not delivered to us by KRA...There were about

20,840 bags ...still in the hands of KRA”.

25 Before me pw 2 stated that the plaintiff’s claim was for 32,410 bags of rice at the value of Ksh 3,050 per bag.

26 There was no attempt by the plaintiff to reconcile all the above different quantities of rice. The court was left with no clear evidence to enable it determine the quantity of rice that was left still at the port after the part of the second consignment was release to the plaintiff and stored at Benvick warehouse. Therein lies the answer to issue (c). Issue (c) is to the effect the plaintiff failed to prove the quantity of rice to which this claim relates.

27 The rice that was not released to the plaintiff, as stated in the previous paragraph, was according to the defendant’s evidence stored at the Kilindini port. The plaintiff did not controvert that evidence. Kilindini port is a corporation which is distinct to the defendant. It follows that if the rice was stored in unhygienic condition the defendant cannot be found to be liable for any loss which the plaintiff incurred as a consequence thereof.

28 I do not find any evidence before court that the plaintiff did request the defendant, as it is pleaded in the plaint, to keep the rice in hygienic conditions.

29 It follows that in respect to issue (d) that the court’s findings is that it was not the defendants responsibility to ensure the storage of the rice was hygienic, rather it was a responsibility of a party not before court, namely Kilindi port (Now known as Kenya Port Authority).

30 Issue (e) and (g) will be considered together because they both relate to the quantification of the plaintiff’s claim.

31 I must begin by saying that the difficulty the plaintiff faces in respect to the two issues above is that it failed to prove the exact quantity of rice its present claim relates to.

32 On paragraph 3 of the further amended plant the plaintiff quantified its claim to Ksh 113,187,184. This, the plaintiff pleaded is made up of “the value, costs, refund for duty paid for transportation costs uncollected rice at commercial rate loss of profit and expenses incurred by the plaintiff in importing a consignment of long white grain rice (Pakistan)...”

33 Although the plaintiff called Pw 3 ANOJ RASIKA SHAH who testified on the price of the rice per bag, without this court knowing with certainty the number of bags involved the court cannot determine the amount of loss, if at all.

34 The plaintiff also failed to prove, specifically as it is required to do, its loss in its claim in special damages. The judges of appeal in the case **HAHN –V- SINGH** (1985) KLR on a claim for special damages had this to say:

Special damages must not only be specifically claimed but also strictly proved. The degree of certainty and the particularity of proof required depends on the circumstances and the nature of the acts themselves.

35 My response therefor, to issue (f) is that the plaintiff failed to prove its claim in special damages.

36 On 3rd March 2000 the plaintiff received communication from the Public health officer in charge Kilindini in respect to the rice detained at the port. That communication stated thus:

The above inspection was carried out on 3rd February 2000 and the below conditions were observed:-

- **Disclouration of the rice grains,**

- **Abnormal odour of the rice gains,**
- **Insect pest infestation,**
- **Some bags rotten.**

Some samples were taken to the government chemist for confirmation of the above conditions, and too the results from the government chemist was that the rice is unfit for human consumption.

The rice is accordingly seized vide our seizure notice ref: PHC.II.VOL.4/81 dated 3rd March, 2000 and the same shall remain binding until such a time that destruction of the goods shall be effected in our presence and to the satisfaction of the port health authority.

(H.H Yusuf)

Public Health officer In charge

Kilindini Port

MOMBASA

37 The effect of that communication is that the rice was seized and was not available to the plaintiff for release.

38 The ministry of Agriculture by its letter to the defendant (Senior Assistant Commissioner of customs and excise) dated 22nd February 2000 recommended that part of the rice could be salvaged as animal feed on the following conditions:

(i) The mode of transport be by rail to the respective godowns.

(ii) That before the wagons leave the port, they must bear our seal which will be unsealed by our officers at the destination.

(iii) We will then ascertain the recommended quantity to be salvaged and the rest destroyed as per our directions and supervision. We recommend that the sorting be done in the warehoused in conjunction with our sister department of veterinary services.

(iv) The owners should provide details of the intended buyer who should be a prominent animal feeds manufacturer.

39 The released of the rice as stated above could not proceed because the rice was still seized by the public health officer, Kilindini. It was not until 10th July 2000 that the public health officer lifted his seizure order on strict condition that the rice be released under the supervision of the ministry of Agriculture.

40 Although the defendant by letter dated 12th July 2000 addressed to the plaintiff confirmed the rice would be released on strict condition it would be used for animal feed, it later by its letter of 24th July 2000 withdrew its approval for its release.

41 A meeting was however convened with representatives of the defendants, ministry of Agriculture and the plaintiff on 13th September 2000. The plaintiff was according to the minutes of that meeting allowed to have the release of the rice on conditions that the ministry was involved. The plaintiff declined to accept the conditions until they had discussed the matter with their lawyer. There is no evidence before court that before filing this present suit the plaintiff sought the release of rice after that meeting. Although the defendant introduced evidence that its counsel had a meeting with the then counsel for the plaintiff about the release of the rice to the plaintiff that evidence will simply be treated as an afterthought because

that evidence was not put to the plaintiff's witnesses to afford them a comment on it. Issue (h) is in the negative.

42 Because issue (h) is in the negative, there cannot be a finding that the plaintiff acted in high handedness or was actuated in malice in failing to release the rice to the plaintiff. Issue (i) therefore is also in the negative.

CONCLUSION.

43 In the end in bearing in mind the above discussion the plaintiff case fails both in its claim for special and general damages. The plaintiff case is dismissed with costs to the defendant

DATED and DELIVERED at MOMBASA this 24th day of September, 2015.

MARY KASANGO

JUDGE

24.9.2015

Coram

Before Justice Mary Kasango

Court Assistant:-

For the Plaintiff:-

For the Defendant:-

Court:

Judgment delivered in their presence/absence in open court.

MARY KASANGO

JUDGE