



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 401 OF 2007

SERRACO LIMITED.....PLAINTIFF

VERSUS

THE ATTORNEY GENERALDEFENDANT

JUDGMENT

1. The plaintiff filed a plaint dated 8th May 2007 and claims that judgment be entered against the defendant for delivery and or return of 582 bales (174,600 pieces) of gunny bags to the plaintiff or in the alternative the payment of Ksh 20,079,000/= together with interest. The plaintiff claim is that sometime in April 1999 the plaintiff imported Seven Hundred (700) bales of gunny bags. Each bale contained 300 pieces of gunny bags giving a total of 210,000 pieces of gunny bags. The said gunny bags were stolen upon being cleared at the port of Mombasa. Thereafter, on 23rd April 1999 officers of the Criminal Investigations Department (CID) arrested the perpetrators of the theft and recovered 582 bales of gunny bags (174,600 pieces of gunny bags) and took possession of the said 582 bales of gunny bags, to be safely kept and were to be used as exhibits in criminal cases to be brought against the perpetrators of the said theft. However, the defendants did not take proper care of the gunny bags, but acted negligently. In consequence the plaintiff has suffered loss and damage.
2. The plaintiff particularizes the defendant's negligent as failing to deliver the said 582 bales of gunny bags to the plaintiff on demand and failing to keep the said 582 bales of gunny bags in safe custody. Consequently, the non-delivery of the said gunny bags to the plaintiff has caused it a total loss of the value of the said gunny bags. That the market value at the time of filing this suit of a piece of gunny bag was Ksh. 115/-, giving a total market value of the gunny bags of Kshs.20,079,000/- .The plaintiff further claims interest at Court rates from the date of filing suit until payment in full.
3. Pursuant to the leave granted on 10th February 2012, the defendant filed its written statement of defence on 16th February 2012. The defendant denied the allegations contained in the plaint. The defendant stated that if a report of theft as alleged was made it was done in the normal course and within the statutory duties of the defendant's agent/or servants. That if any arrest was effected and gunny bags alleged recovered then the said gunny bags ought to be held as exhibits and/or produced so as to form part of the record in a criminal trial against the alleged perpetrators. The defendant additionally states that it was within the mandate of the judicial authority to decide the entitlement and not the defendant and puts the plaintiffs to strict proof pointing that in view of the averment, the plaintiff's suit as it is, is premature, incompetent and based on mere speculations and/or brought in bad faith to prompt/and/or discredit the findings of the pending criminal cases and/investigations by the concerned authority. That the claim is vague and does not disclose any

cause of action against the defendant and the allegation of loss is denied as the same lacks particulars thereof. On the issue of particulars of negligence as raised, the defendant reiterated that there was no cause of action. In general the defendant states that the only body with the mandate to determine the proprietorship of goods recovered after theft if any is the court as such the suit herein was brought prematurely as no cause of action has been established against the defendant. The allegations of value of the alleged gunny bags contained in paragraph 11 of the plaint are also denied and the plaintiff is put to strict proof. The defendant in the alternative averred that the suit is statute barred, incompetent and bad in law and the defendant shall before the hearing hereof raise a preliminary objection to have the entire suit struck out for incompetence. The defendant further claimed that no demand had been made or notice issued prior to filing the suit and further states that the suit is bad in law for non-compliance with the requirements of the provisions of Government proceedings Act Cap 40 Laws of Kenya. It also stated that this Honourable Court lacks jurisdiction to hear and determine this suit as the cause of action alleged occurred in Mombasa and not within the jurisdiction of this court.

4. The plaintiff filed its list of witnesses and list of documents on 11th September 2012. During the hearing **PW1** Benjamin Kobetbet a director of the plaintiff company as well as the general manager testified that sometimes in 1998 he ordered for 700 bales of gunny bags from Bangladesh. He received a profoma invoice from Bangladesh Jute Mills Corporation. On receipt of the profoma invoice he applied for a letter of credit from his bank who issued a letter of credit to Bangladesh Jute Mills Corporation. That the transporter who was hired to transport the gunny bags from Mombasa port together with two of his employees countermanded and stole the gunny bags. He reported the theft to the Criminal Investigation Department who later arrested the perpetrators and recovered 582 bales of gunny bags which remained in the possession of the CID but since then he has never received his gunny bags that were in the custody of the CID. He stated that there were two cases filed in the trial court being 6716 of 1999 and 12282 of 1999 and that people were arrested and charged. He stated that the two cases were connected to the gunny bags but the files could not be traced. He testified that whilst at the trial court the police did not come with the exhibits but with photographs of the exhibits and he was not aware if judgment was delivered. They identified the gunny bags when they were recovered. PW1 referred to the importation documents which the company received when they imported the goods. PW1 stated that they have gone to the CID uncountable times to inquire about the gunny bags and they haven't recovered them. That the recovered bales were 582 with 300 gunny bags each totaling to 174600 gunny bags. Each at a cost of 115/- hence their amount for Kshs. 20,079,000/-
5. The defendants did not call any witnesses.
6. The plaintiff filed its submissions on 26th February 2013. The plaintiff's counsel reiterated the plaintiff's evidence as adduced in court and referred to the documents used by the plaintiff in importing the gunny bags. The plaintiff submitted that the defendant failed to adduce evidence and relied on the case of **Edwards Muriga through Stanley Muriga –vs- Nathaniel D. Schulter Civil Appeal No 23 of 1997** where it was held that,

“In this matter apart from filling its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st Plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remain mere allegations ...the plaintiffs have given evidence on oath supported by documentary evidence which go to prove their case. Accordingly in the absence of any evidence to the contrary and as proof in civil cases are a balance of probabilities, I find that the plaintiffs are entitled to succeed”.

The plaintiff stated that the defendant did not adduce any evidence and as proof in civil cases is on a balance of probabilities the plaintiff is entitled to judgment. It was further submitted that the defendant had unlawfully detained the plaintiffs' goods. Counsel referred the court to the case of **D. T. Dobie and Company (Kenya) Limited** where Judge Madan stated that,

“to constitute detention there must be a positive wrongful act of dealing with the goods in a manner inconsistent with the owner’s rights and an intention in so doing is to deny the owner’s right.”

7. That once the CID recovered the gunny bags they took the gunny bags into custody to use them as exhibit hence they became bailees and would be in breach of their duty if they alienated or lost the bailed goods. That the Plaintiff had written to the defendants to deliver the gunny bags as evidenced by their two letters one dated 26th may 2004 and one dated 1st August, 2012. The plaintiff cited the case of **Kenya Akiba Micro Financing Limited V Ezekiel Chebii & 14 Others [2012] eklr** where the court held that

“Section 112 of the Evidence Act Chapter 80 of the laws of Kenya provides:-

In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proofing of disproving that fact is upon him.....where a party has custody or is in control of evidence which that party fails or refuses to tender or produce, the court is entitled to make adverse inference that if such evidence was produced, it would be adverse to such a party’. The plaintiff cited the case of **Kimotho –vs- KCB (2003) 1 EA 108** the court held that adverse inference should be drawn upon a party who fails to call evidence in his possession.

8. It was further submitted that it is unchallenged that the defendant took possession of the gunny bags and them failing to tell the court what happened to them or the criminal case file they have been left to draw an inference that the defendant has misappropriated and converted the gunny bags into its own use .To support his submissions the plaintiff relied on the case of **Linus Nganga Kiongo& 3 Others V Town Council Of Kikuyu Nairobi High Court Civil Case No.79 Of 2011.**
9. In conclusion the plaintiff sought leave to amend their plaint seeking cost of suit. The plaintiff also urged the court to use its discretion to allow amendment of pleadings as is found in Order 8 Rule 3(1) and Rule 5 of the Civil Procedure Rules which provide as follows:

“3. (1) Subject to Order 1, rules 9 and 10, Order 24, rules 3, 4, 5 and 6 and the following provisions of this rule, the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings....

5. (1) For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.

(2) This rule shall not have effect in relation to a judgment or order.”

The Constitution in Article 159(2) in addition also now enjoins this court to dispense substantive justice without undue regard to technicalities.

10. Mr. Owino submitted that the principles governing the amendments of pleadings are well settled. The granting or refusal of leave to amend any pleading is a matter that is within the discretion of the court but such discretion should be exercised judiciously. Further, amendments should be liberally allowed, unless it is demonstrated that a party will suffer prejudice that cannot be compensated by way of costs. These principles were explained in the Court of Appeal decision in **Central Kenya Limited –v- Trust Bank Limited (2000) EALR 365**

“...a party is allowed to make such amendments as may be necessary for determining the real issues in controversy or to avoid a multiplicity of suits provided there has been no delay, that no new or inconsistent cause of action is introduced, that no vested interest or accrued legal right

is affected, and that the amendment can be allowed without injustice to the other side....”

11. The defendant filed submissions on 5th March 2013. The defendant submitted that the plaintiff's failure to file a copy of the proceedings in the criminal case No 6716/99 which would have shown that indeed the exhibits were produced and marked in court was fatal. That the plaintiffs' also failed to produce any documentary evidence of their efforts to trace or obtain the proceedings in the said criminal file. Which was crucial in proving if that the criminal case in the lower court was ever finalized and the outcome thereon and that since this outcome was vital in this case the plaintiff should not lay his hands on what he has not proved as a fact and relied on the case of ***Omar Salim Bendo –Vs Luke Mutiso & Another (2005) Eklr. justice Mwera stated***

“fraud is a serious claim, it is even criminal with that the civil procedure rules require that its particulars should be specifically set out to enable the defendants to react to them, it cannot be said that such has been the case here against the 2 defendants alone or jointly.....”

12. The defendant submitted further that the plaintiff failed to show that Serraco Company was duly registered at the time of filing this suit and also failed to produce any document to that effect and stressed that failure to disclose the existence and ownership of the company is fatal. That the plaintiffs' failure to include the judiciary was defective because Kibera Law Courts was adversely mentioned as having failed to trace the criminal case file hence denying the plaintiff access to vital documents.

13. That the plaintiff had failed to connect the defendant with the alleged disappearance of the exhibits and that the delivery notes annexed purported to have been signed by Criminal investigation officers did not bear the name or rank of the officer who signed them and also that the delivery notes did not have an official police logo, letterhead or stamp and as such the said delivery notes lacked authenticity they further added that the plaintiff failed to call any drivers who he claimed drove the lorries that transported the gunny bags to the police station. Mr. Fedha referred the court to ***Section 109***, section 110 and Section 112 of the Evidence Act.

Section 9 provides that,

“the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person”

Section 110 provides that, *“the burden of proving any fact necessary to be proved in order to enable any person to give evidence of any fact is on the person who wishes to give such evidence”* and

Section 112 provides that *“in civil proceeding, when any is especially within knowledge of any party to those proceedings, the burden of proving or disapproving that fact is on him”*.

14. It was further submitted that the suit was time barred as the same fell within section 3(1) of the Public Authority Limitation Act Cap 39 laws of Kenya which provides that no proceedings founded on tort shall be brought against the government or local authority after the end of twelve months. That this suit was filed in 2007 while the cause of action took place in 1997. On this the defendant relied on the case of ***Nairobi Civil appeal 593 of 2003 and Charles Wanduto Kihoro – vs- National Bank of Kenya 7 another high court of Kenya, Nairobi civil suit 1403 of 2000*** which two cases enunciated the issue of time in filing of a claim in tort.

15. It was further submitted that the plaintiff has no cause of action and that the suit should be dismissed and added that the defendant would be highly prejudiced if the amendment is allowed.

Adding to that the defendant submitted that there no cause of action in this suit stating that the plaintiff should have applied to the Kibera Chief Magistrates Court to have the exhibit released to him before moving this court and as such the suit is premature and should be dismissed.

16. On leave to amend it was submitted that the plaintiff is trying to open the case and to circumvent the law. That the plaintiff had ample time to seek leave to amend out of time thought the provisions of **Order 8 Rule 3** are clear and that the court may at any stage of the proceedings allow a party to amend their pleadings, allowing the plaintiff's application at this stage would be highly prejudicial to the defendant.

17. I have carefully considered the plaintiff's evidence the oral and written submissions made by the parties. The plaintiff's claim is based on negligence as particularized at paragraph 8 of the plaint that the defendant failed to deliver the 582 bales of gunny bags to the plaintiff and that the defendant failed to keep the gunny bags in custody. The plaintiff's evidence is it imported 700 gunny bags. Evidence of importation was adduced through documents at pages no 1 to 16 of its list of documents. The plaintiff evidence is that after the goods were stolen on transit the persons with the goods were charged at Kibera Law courts. The plaintiff produced a bond to attend criminal case no. 6716/99 and 12282 /99. As submitted by the defendant it was very vital for the plaintiff to attach the said proceedings from Kibera Law Courts to prove that they were the subject matter of a court proceeding and that they were produced in court as exhibits. The plaintiff as the one who filed the suit should have tendered the court proceedings. There is no record that it sought proceedings from the Chief Magistrate's Kibera law court. Even though the plaintiff claims that the court file got lost, it was upon the plaintiff to show that it moved the court and there was no response. To merely state that the court file got lost isn't sufficient. As correctly submitted he who alleges must prove and in my view the provisions of sections 109, 110 and 112 strictly apply in this case. Proof of importation was established, but this is a case that required more than one witness or further documents to establish that the goods were taken to court or held by the police at a certain police station. It was vital that the plaintiff proves the defendant's negligence.

18. Further the gunny bags were alleged to be exhibits in the criminal case. Why didn't the plaintiff join the Chief magistrate Kibera Law Court as a party to the suit if indeed the case was heard? Had the plaintiff attached the proceedings this court could have been able to determine the issue of limitation too. Further the plaintiff submitted that the defendant detained the goods. I find that the claim for detinue wasn't pleaded in the plaint. A party is bound on its pleadings. The plaintiff claim is based on negligence. I could agree with the defendant's counsel submissions that his case was prematurely filed. Attaching delivery notes only without evidence to corroborate what happened is not sufficient proof of negligence as alleged.

19. The defendant submitted that the suit is time barred. This is an issue I cannot ignore even if the defendant did not plead this fact in their defense. However, the law is clear on when a claim of tort can be brought against the government. Section 3(1) of the Public Authority Limitations Act CAP 39 provides that;

“No proceedings founded on tort shall be brought against the Government or a local authority after the end of twelve months from the date on which the cause of action accrued.”

20. The delivery notes are dated 1999. The question I ask myself is, if there was a case at Kibera Law Courts in 1999 when was it finalized? When did the cause of action arise? If the cause of action arose in 1999 the plaintiff had 3 years from 1999 the year the goods were delivered to the police to sue the defendant. This suit was filed in 2007. 3 years from 1999 takes one to 2002. The suit was filed 5 years later. I find that the plaintiff's suit is time barred.

21. However, had the plaintiff succeeded in proving its claim, and adducing evidence that there were gunny bags held by the CID this court could have ordered the return of the said gunny bags. On the plaintiff's claim of the value of the gunny bags of Kshs. 20,079,000/- I find that there was no evidence from the plaintiff that it traded in gunny bags. There is evidence of importation. If the

plaintiff was trading in gunny bags it ought to have adduced evidence of such trade. I wonder why it choose to get a letter of quotation document no. 34 from the firm of *Bags and Bailers Manufacturers Limited* to prove the cost of each gunny bag. What the plaintiff ought to have claimed was the actual cost of the goods it lost after importation.

22. On the amendment of the plaint to include costs, the provisions of order 8 Rule 3 (2) gives the Court discretionary powers to allow the amendment provided it does not prejudice the other party. Any order for costs in my view would not have prejudiced the defendant; therefore I would have allowed the amendment. All in the entire plaintiff's claim must fail and the same is dismissed with costs to the defendant.

Orders accordingly

Dated, signed and delivered this **24th** Day of **January** 2014.

R.E. OUGO

JUDGE

In the presence of:-

..... For the Plaintiff

.....for the Defendant

.....Court Clerk