



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 112 OF 2013

PAN AFRIC COMMODITIES LIMITED.....PLAINTIFF

Versus

FREIGHT FORWARDERS KENYA LIMITED.....1ST DEFENDANT

KENYA REVENUE AUTHORITY.....2ND DEFENDANT

JUDGMENT

1. The Plaintiff filed this case on 1st October 2013 and stated that on diverse dates between September 2011 and July 2012, it contracted the 1st Defendant to do the work of clearing and forwarding and other logistics of its consignment from the Port of Mombasa. That the consignment which comprised of Russian Milling Wheat was stored at shed No. 3 and 4 operated by Grain Bulk Handlers Limited.
2. The Plaintiff alleged that the Defendants conspired and made plans to condemn the Plaintiff's goods as being unsuitable for both human and animal consumption. That the 2nd Defendant took samples of the wheat to the Ministry of Public Health and Sanitation without involving the Plaintiff and subsequently issued a faulty Certificate of Analysis with a view to destroying the Plaintiff's consignment. The Plaintiff stated that the certificate of analysis issued by the 2nd Defendant was faulty because:
 - i. **The amount of Aflatoxin B₁ and G₁ was not stated.**
 - ii. **The infestation report on the wheat was ambiguous.**
 - iii. **The moisture content was exaggerated because wheat from Russia is thoroughly checked on its moisture content before shipment.**
3. The Plaintiff prayed that an order do issue to restrain the Defendants from destroying the Plaintiff's consignment of wheat. The Plaintiff also prayed that a mandatory order of injunction do issue to compel the Defendants to release the consignment of wheat to the Plaintiff. The Plaintiff further prayed that the Defendants be compelled to take new samples from the consignment of wheat at random and proceed to analyze the same together with the Plaintiff in order to reach a fair and acceptable analysis.
4. Both Defendants filed their respective Statements of Defence to the suit. The 1st Defendant filed its Defence on 4th November 2013 while the 2nd Defendant's Defence was filed on 5th November 2013.

5. On 6th October 2013, the parties recorded a consent under which the 1st Defendant was struck out from this suit on the ground that it was improperly enjoined as a party. By the same consent, parties agreed that the Plaintiff do take out new samples from the consignment of wheat at random and proceed to analyze the same at its costs in order to reach an acceptable and fair analysis. That consent effectively disposed of the Plaintiff's prayer that new samples be taken and analyzed jointly.
6. The parties took joint samples of the consignment on 15th November 2013. The samples were then forwarded by the Plaintiff to SGS Kenya Limited Laboratory Services who analyzed the same and prepared a Report dated 21st November 2013 ("**the SGS Report**") which was availed to court as annexure to the Further Affidavit filed on the Plaintiff's behalf on 10th December 2013. The SGS Report showed that the test results were within the EAS 51:2011 specification, an indication that contrary to the 2nd Defendant's analysis, the wheat was fit for human consumption.
7. Due to the conflicting analysis results, this Court, on 10th December 2013, after having a discussion with the parties directed that the Plaintiff and the 2nd Defendant's avail their experts in court so that they could give evidence in support of their respective reports. Having made that order, it is the basis upon which this Court decided to write this judgment, rather than a Ruling, since all the issues in the suit will be determined.
8. On 19th December 2013, the Defendant's analyst, DADSON KAMAU, an employee of the Ministry of Health, Government Chemist Department who had analyzed the samples of the Plaintiff's wheat testified in court on how he had arrived at his analysis.
9. The Plaintiff's analyst was however not in court so the matter was adjourned to 11th March 2014 to enable the Plaintiff's analyst to testify. On 13th March 2013, the Plaintiff's analyst was not available and the matter was adjourned to 12th May 2014 but the said analyst also failed to attend Court on that date. The Plaintiff was granted the last adjournment to 7th July 2014 to enable it avail its analyst. On 7th July 2014, the Plaintiff's counsel told court that he didn't know when the analyst would come to court. The court therefore ordered that the Plaintiff's case be marked as closed and that parties do written submissions to enable the court to consider its judgment.
10. The Plaintiff filed its Written Submissions on 6th August 2014 while the 2nd Defendant filed on 22nd September 2014.
11. As already observed, the Plaintiff did not call any witness. The 2nd Defendant's sole witness, DADSON KAMAU testified on how he conducted the analysis on the wheat and how he arrived at his conclusion that the goods were unfit for human and animal consumption. He referred to his Certificate of Analysis dated 2nd August 2013 which was annexed to the 2nd Defendant's Replying Affidavit sworn by AQUILINO MWITHALI on 26th February 2014 and filed on 7th March 2014.
12. Mr. Kamau told court that he examined sample of the wheat which was delivered to him by the Public Health Officer as **sample no. 225/2013**. He testified that his finding on physical examination of the sample was "**mouldy had foul smell**" and the same was infested with live and dead pests. That he was using **East African Standard No. 2 of 2005** which deals with cereal quality confirmation and provides that cereals should be free of moulding and insects. That he was able to determine the presence of mould by physically examining the sample and the insects by physically looking at the same. He stated that the moisture content of the wheat sample at 105⁰C for 3 hours was **10.64%^m/m**. That the moisture content of wheat coming into the country was required to be at **14%** thus the moisture content of the sample was within the acceptable range. The witness told court that Aflatoxin B₁ and G₁ was detected in the sample.
13. Mr. Kamau referred the court to his second Certificate of Analysis dated 2nd December 2013

which was a result of a second analysis of the wheat sample known as **sample no. 399/2013**. This second sample was collected from the Plaintiff's consignment by the 2nd Defendant's official in the presence of the Plaintiff's representative and submitted for testing on 29th November 2013. The results of the second sample revealed that the wheat was mouldy, heavily insect-damaged and with a pungent smell. It had infestation of live and dead pests. The moisture content was **10.70%**. The content of Aflatoxin B₁ B₂ G₁ and G₂ was found to be **above 20ppb**. The witness testified that the acceptable standard of Aflatoxin for human consumption is 10ppb hence the Aflatoxin content of the wheat sample was above the recommended range.

14. The witness told court that the method used in the SGS Report to test the wheat sample namely "**flourometer**" was not known to be used in testing Aflatoxin. That the known method is eliza which he used in his tests.

15. This court was faced with the dilemma of two conflicting reports of the results of the analysis carried out on samples of the Plaintiff's wheat. In order to arrive at a just finding, it was important that the experts who had conducted the analyses be availed to court so that they could tell the court how they conducted their respective tests and to be asked questions on their reports. It is only the Government analyst who came to defend his report and the method he used to arrive at his findings. The Plaintiff's analysts did not come to court. As a result, the veracity of the Plaintiff's Report was not tested. This court is therefore not able to tell which method was employed by the Plaintiff's analyst to carry out the tests and whether the same were acceptable and accurate. The court is left with no option but to go with the findings of the Government Analyst as the same remain unchallenged. That means that there is nothing that this court can rely on to discredit the findings that the Plaintiff's wheat is unsuitable for human consumption. On that basis, the Plaintiff's case shall be dismissed with costs to the 2nd Defendant.

16. The Plaintiff failed to satisfy the burden of proof as required under Sections 107 to 112 of the Evidence Act Cap 80.

17. Accordingly I grant the following orders-

- a. **The Plaintiff's suit is hereby dismissed with costs to the 2nd Defendant.**
- b. **The Russian wheat consignment the subject of this case shall immediately be destroyed by burning. The 2nd Defendant shall ensure the presence of all necessary personnel for such destruction.**

DATED and DELIVERED at MOMBASA this 20TH day of NOVEMBER, 2014.

MARY KASANGO

JUDGE