



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI COMMERCIAL &ADMIRALTY DIVISION**

**CIVIL CASE NO. 541 OF 2012**

**PATMOSE TECHNICAL SERVICES (K) LIMITED ::::::::::::::: PLAINTIFF**

**VERSUS**

**RURAL ELECTRIFICATION AUTHORITY ::::::::::::::: DEFENDANT**

**J U D G E M E N T**

1. By a Plaint dated 13th August 2012 and filed in court on 24th August 2012, the Plaintiff claims a customs duty reimbursement of Kshs.30,477,023.00 being extra customs duty it paid on behalf of the Defendant together with interest thereon at 18% per annum.
2. The brief history of the suit is that the Plaintiff won a Tender Number REA/11-12/OT/002 by the Defendant for the supply of conductors, cables, stay wires and binding wires, the same to be delivered to the Defendant on or before 30th November 2010 at 10.00 a.m. The closing day for submission of tender items was subsequently extended to 7th December 2010. The Plaintiff states that between the period running May to September, 2011 it imported ACSR cables from China and supplied the same to the Defendant. The supplies were duly accepted and utilized by the Defendant. The Plaintiff states further that at the time the consignment of conductors was being cleared at the port of Mombasa the custom duty payable had been raised to 25% on the customs value. The Plaintiff avers that it duly paid import duty on the conductors and furnished the Defendant with copies of the approved customs entry evidencing import duty paid thereof with a request that the Defendant do reimburse the Plaintiff the additional 15% import duty paid thereon as follows but the Defendant has failed, refused and / or neglected to make good the Plaintiff's request:-

<b>Entry No. (2011 MSA)</b>	<b>Date</b>	<b>Applicable duty at 10% at the time of tendering (Kshs. )</b>	<b>Actual duty paid at 25% when goods were cleared at the port (Kshs.)</b>	<b>Difference on duty actually paid (Kshs. )</b>
2863742	26.05.2011	2,866,993.00	7,167,484.00	4,300,490.00
2871065	31.05.2011	3,318,934.00	8,297,337.00	4,978,402.00
2889871	10.06.2011	2,863,813.00	7,159,533.00	4,295,720.00
2940757	10.07.2011	2,971,599.00	7,428,998.00	4,457,399.00
3020492	24.08.2011	3,104,606.00	7,761,516.00	4,656,909.00
3068998	23.09.2011	2,416,219.00	6,040,549.00	3,624,330.00
3069251	23.09.2011	2,775,848.00	6,939,622.00	4,163,773.00

				<b>30,477,023.00</b>

3. The Plaintiff states that the tender document is silent on the party to bear the burden of any budgetary adjustments on the custom duty payable and in the circumstances the Plaintiff shall crave leave of this honourable court to rely on the provisions of Section 120 of the Customs and Excise Act, Chapter 472 of the laws of Kenya for their full effect and import.
4. The Plaintiff states that the reason advanced by the Defendant for its refusal to reimburse the extra custom duty paid for by the Plaintiff, namely, that the Plaintiff should have factored in the duty payable whilst pricing because the minister for finance had announced in the year 2010 / 2011 budget speech in June, 2010 an increment in duty on aluminium conductors with steel core from 10% to 25% is manifestly erroneous for the principal reason that any budgetary adjustments on the duty payable on certain specified goods are not effected unless and until a Finance Act to the effect is duly gazetted in the Kenya Gazette or in the East Africa Community Gazette for goods under the East Africa Community external tariff; therefore the applicable rate of tax at the time the Plaintiff tendered for the supply of the ACSR conductors to the Defendant was 10% of the customs value and which rate the Plaintiff duly factored in its pricing.
5. The Defendant filed a defence dated 21st September 2012 and denied the Plaintiff's claim in its entirety and particularly denied owing the Plaintiff any refund of the sums stated and averred that the Plaintiff ought to have taken into consideration the increase of customs duty from 10% to 25% in their quotation.
6. The parties complied with Order 11 of the Civil Procedure Rules and filed their Bundle of Documents and Witness Statements, and appeared before the court for hearing of the matter on diverse dates between 13th May 2014 and 17th October 2014. Each party provided a single witness for their cases. Upon the completion of the oral hearing of the Witness Testimonies, the parties filed written submission in the matter.
7. The Plaintiff called one witness, PW1, Sameet Patel – the Sales and Marketing Director of the Plaintiff. In a nutshell, PW1 testified that at the time of tendering for the supply of interalia, ACSR, this being specifically on 07.12.2010, when the tender bids were submitted, the rate of customs duty incorporated in the price list for ACSR by the Plaintiff and which price list was accepted by the Defendant and the suit tender awarded to the Plaintiff, was 10% on the customs value. That this rate was subsequently varied vide East African Community Legal Notice No. EAC/07/2011 dated 22.03.2011 the same being increased to 25%, a variation of 15%. Therefore, during the time of submitting its price lists on 07.12.2010, the applicable rate of duty levied on ACSR was 10% and, accordingly, the prices that the Defendant accepted on the ACSR had the 10% customs duty applied thereon and consequent to the variation of the same on 22.03.2011 by a 15%, the prices payable by the Defendant to the Plaintiff on the ACSR had to be accordingly reviewed upwards by 15%.
8. It was PW1's testimony that the Plaintiff having had no knowledge/notice of the variation in the rate of customs duty payable on the ACSR at the time of bidding, that is, 07.12.2010, the variation being effected only later on 22.03.2011, the Plaintiff was entitled to a reimbursement of the extra customs duty it paid to Kenya Revenue Authority in the sum of Kshs. 30,477,023/=.
9. PW1 stated that the tender document was silent on which party would be required to bear such a variation, the only requirement in the tender document being that the price list submitted to the Defendant by the Plaintiff should be "Delivered Duty Paid" (DPP), meaning that the applicable rate of customs duty payable should be included in the price list tendered. The Plaintiff had incorporated the rate of 10% of the customs value in its price lists.
10. The other salient feature of PW1's testimony was that the date inserted in the contract executed between the Plaintiff and the Defendant, that is, 03.05.2011 (Page 42 of the Plaintiff's Exhibit) was mischievously inserted therein by the Defendant's officers in an attempt at defeating the Plaintiff's claim herein. He asserted that this particular date was curious because it is on the same date that the Plaintiff, first, wrote to the Defendant requesting a review of the prices payable on the ACSR following a 15% variation on the customs duty payable. He narrated that after being

informed in writing by the Defendant of the award of the suit tender on 22.02.2011, it collected the contract forms from the offices of the Defendant duly executed them within the required period of 30 days from 22.02.2011 and, therefore, in his recollection and computation the Plaintiff returned the contract document duly executed well before 23.03.2011. The Plaintiff did not date the contract document because it had not been signed / executed by the Defendant. According to his evidence, it was the Defendant who dated the contract document, that in fact, the contract document in its original form is dated in blue ink same as the ink used in execution of the contract document by the Defendant. Be that as it may, this date of execution could not be correctly stated as 03.05.2011 as that would be in clear breach of clause 2.29.2 of the tender document and paragraph 3 of the Defendant's letter dated 22.02.2011 notifying the Plaintiff of the award of the suit tender to the Plaintiff which required the contract document to be executed by the parties within 30 days but not earlier than 14 days from the date of the letter, 22.02.2011.

11. In conclusion, PWI asserted that the Plaintiff was fully entitled to be reimbursed by the Defendant of the sum of Kshs, 30, 477,023/- being the extra customs duty paid by the Plaintiff to Kenya Revenue Authority on ACSR and further the Defendant should pay interest thereon at a commercial rate of 18% per annum on this sum for its unjustified withholding of the claimed sum adversely affecting the financial operations of the Plaintiff's business and further be awarded costs of the suit plus interest at court rate as prayed for in the Plaintiff.

12. The Defendant called one witness, Joel Omusebe, DW1, the Chief Procurement Officer of the Defendant. The main thrust of the testimony of DW1 is that in as much as there is concurrence between the Plaintiff and the Defendant that indeed customs duty rate applicable and payable on the ACSR was varied from 10% to 25% on the customs value, the variation being effected vide East African Community Gazette Legal Notice No. EAC/ 07/2011 dated 22.03.2011, the Plaintiff should meet the liability on the extra customs duty paid to Kenya Revenue Authority in the sum of Kshs. 30,477,023/-. The reason DW1 assigned to this argument is that the Plaintiff having executed the contract to supply the ACSR and which is dated 03.05.2011 and the Plaintiff having not raised the issue of variation on the customs duty payable with the Defendant before execution of the contract to supply, then the Plaintiff had to bear the liability in respect of the variation. DW1 also sought to rely on the three (3) reasons advanced by the Defendant in its letter dated 16.05.2011 addressed to the Plaintiff rejecting the Plaintiff's request for a review of the prices payable by the Defendant in respect of ACSR in view of the variation in the customs duty payable on the said goods.

13. DW1 testified that the date inserted in the contract to supply, to wit, 03.05.2011 was correct and denied that it was mischievously inserted therein by the Defendant in an attempt at defeating the Plaintiff's claim herein. He, however, conceded in cross-examination that pursuant to the provisions of clause 2.29.2 of the tender document (page 22 of the Plaintiff's Exhibit) as well as the third paragraph of the Defendant's letter dated 22.02.2011 (Page 81 of the Plaintiff Exhibit) notifying the Plaintiff of the award of tender to supply, inter alia, ACSR, the last day on which the contract to supply should have been executed was **23.03.2011**. He failed to explain why the contract to supply was not signed by the deadline of 23.03.2011 and the same was purportedly signed over two months later from the date of notification of award of the tender, namely, 22.02.2011. He also testified that the party that would bear the liability to meet the customs duty payable on ACSR supplied was the Defendant being the procuring entity, for the reason that the price list encompass the actual rate of customs duty to be paid on the ACSR.

14. The parties settled on the following issues for determination:-

0. ***What constitutes a contract in a tender?***
0. ***What was the contract entered into by the parties?***
0. ***What was the applicable customs duty at the time of issuing the contract?***
0. ***What actual rate of percentage did the Plaintiff pay as customs duty?***
0. ***Whether the Defendant is liable to the Plaintiff for the said overpayment.***

15. To prove their case, the Plaintiff's counsel Mr. Stanley Henry submitted that at the material time of bidding/tendering, namely, 07.12.2010, the applicable rate of customs duty levy on ACSR conductors was 10% on the customs value. This position is also confirmed by DW1 in his cross-examination. Consequently, the Plaintiff factored in the 10% levy in respect of the customs duty

payable in its price list comprised in the tender document at the time of submitting its bids on 07.12.2010. The counsel submitted that there is no need to overemphasize this indisputable fact. Further, the legal instrument for effecting any changes on the customs duty payable on imports from outside the East African Community member states is the East African Community Gazette Legal Notice. That being the case, the counsel submitted, it is agreed between the parties herein that the variation in the rate of customs duty payable on the ACSR conductors whose supply the Plaintiff tendered for and won, was varied from 10% to 15% vide East African Community Gazette Legal Notice No. EAC/7/2011 published on 22.03.2011. The publication on 22.03.2011, of course, came after over three (3) months since the Plaintiff submitted its tender inclusive of price lists to the Defendant on 07.12.2010. It is, therefore, untenable to advance the argument, as the Defendant does, that by the time the Plaintiff submitted its tender / price lists to the Defendant on 07.12.2010, it ought to have factored in the 25% rate of customs duty payable on ACSR for the simple reason that by 07.12.2010, the applicable rate of customs duty levied on ACSR conductors was 10% and the variation to 25% had not been effected, not until 22.03.2011.

16. Further, submitted counsel, it is obvious that at the time of tendering, that is, closing and opening of the suit tender on 07.12.2010 to the time of the signing of the contract done before 23.03.2011, none of the parties had come across the East African Community Gazette Notice No. EAC/07/2011 effecting the variation of 15%. The counsel submitted that the other contention by the Defendant in its letter dated 16.05.2011 that the Finance Minister of the Republic of Kenya had announced in his budget speech in June, 2010, that the customs duty rate levied on the ACSR would be increased from 10% to 25% is wholly untrue and erroneous for the reason that it is not in the province of the Finance Minister of the Republic of Kenya to pronounce or effect any change in the rate of customs duty payable on ACSR and no such a pronouncement was ever made as can be seen in the Finance Act No. 10 of 2010 annexed to the Defendant's Exhibit dated 06.05.2013 and filed in court on 04.06.2013. The duty and obligation for effecting such a change is in fact bestowed on the Council of Ministers of the East African Community established under Article 12 of the Protocol on the Establishment of the East African Customs Union. The relevant legislation is the East African Community Customs Management Act, 2004. Under Part II Sections 3 and 4 of the East African Community Customs Management Act, is constituted the Directorate of Customs which, inter alia, administers the Common External Tariff imposed on goods imported from foreign countries into the East African Community member states. Therefore, the contention by the Defendant that the variation in the rate of customs duty levied on ACSR had been effected in the budget speech read by the Minister For Finance of the Republic of Kenya in June, 2010 is a misapprehension of the law relating to the administration of customs under member states of East African Community as demonstrated hereinbefore.

17. With regard to the third reason advanced by the Defendant for its refusal to reimburse the Plaintiff the extra customs duty paid, the Plaintiff submits that The East African Community Gazette Notice No. EAC/07/2011 effecting the variation is dated / issued on 22.03.2011. At the bottom it is stated: THIS LEGAL NOTICE IS DEEMED TO HAVE COME INTO EFFECT ON 1<sup>ST</sup> JULY, 2010. What this means is that all affected imports brought into the East African Community member states from 01.07.2010 were subject to the variation of 15% on the customs duty payable. It doesn't mean that importers like the Plaintiff should have known as far back as from 01.07.2010 that the customs duty rate had been varied by 15% - that would be an illogical supposition.

18. As regards the date when the contract was executed, the counsel submitted that the date was inconsequential. It was the view of the Plaintiff that nothing turns on this date, and that the relevant date that the honourable court should concern itself with is the date when the price lists in respect of ACSR were submitted to the Defendant by the Plaintiff. And that date is 07.12.2010. This is the operative date that should be borne in mind with a view to resolving the only pertinent question in this case, namely, whether the Plaintiff at the time of submitting its tender on 07.12.2010, indeed factored in its price lists a customs duty rate of 25% actually paid for by the Plaintiff on ACSR when the same was cleared at the port of Mombasa. And the unequivocal answer, as far as the Plaintiff is concerned, is that the Plaintiff factored in the rate of 10% which was the applicable rate prevailing as at 07.12.2010. Consequently, the Plaintiff is entitled to be

reimbursed by the Defendant of the extra 15% variation effected on 22.03.2011 vide East African Community Gazette Legal Notice No. EAC/07/2011.

19. Coming back to the date appearing on the contract document, that is, 03.05.2011 and looking at the rival testimonies tendered in court by PW1 as against DW1, Mr. Stanely Henry referred the court to the provisions of Clauses 2.29.1, 2.29.2 and 2.29.3 of the suit tender document at page 22 of the Plaintiff's Exhibit which provide as follows:-

**2.29.1** At the same time as the Procuring Entity notifies the successful tenderer that its tender has been accepted, the Procuring Entity will send the tenderer the Contract Form provided in the tender documents, incorporating all agreements between the parties.

**2.29.2** The parties to the contract shall have it signed at least fourteen (14) days from the date of notification of contract award unless there is an administrative review request.

**2.29.3** At least fourteen (14) days of receipt of the Notification of award and Contract Form, the successful tenderer shall sign and date the contract and return it to the Procuring Entity.

20. According to the testimony of PW1, the Plaintiff collected the contract documents from the offices of the Defendant after the Plaintiff acknowledged the Defendant's notification of award of the suit tender vide the Plaintiff's letter dated 03.03.2011 to be seen at page 82 of the Plaintiff's Exhibit. The Plaintiff's Managing Director, one Engineer S. M. Patel duly signed and stamped the contract document and his signature was witnessed by Sameet Patel, a director of the Plaintiff who happens to be PW1 herein. The signatures of these two persons can be seen at page 44 of the Plaintiff's Exhibit. It was the testimony of PW1 that on the original contract document and which original document was shown to both the defence and the court, the signatures on the part of the Plaintiff's officers was appended using black ink.

21. PW1 further testified that in his recollection the contract document was signed on behalf of Plaintiff within the stipulated time frame under the provisions of clause 2.29.3 of the tender document and, therefore, the correct date on the contract document should have been on or before 23.03.2011 and not before 07.03.2011 and no other date whatsoever. It was, consequently, the testimony of PW1 that the date of 03.05.2011 had been mischievously inserted on the contract document in similar blue ink that is the same ink used by the officials of the Defendant to execute the contract document at page 44 of the Plaintiff's Exhibit with the sole purpose of defeating the Plaintiff's claim. The counsel submitted that this date is incorrect and was actually inserted in the said contract by the Defendant after the Plaintiff wrote to the Defendant on 03.05.2011 (coincidentally the same date) asking for a review of the prices of ACSR following the variation in the rate of customs duty payable. Be that as it may, the Plaintiff has already submitted that the correct operative date that is relevant in determining the dispute before the court is 07.12.2010, being the date when the Plaintiff submitted its price lists to the Defendant. As at 07.12.2010 the rate of customs duty payable on the ACSR conductors was 10% and it is this percentage that the Plaintiff factored in its costing on the ACSR.

22. Therefore, it follows that the Defendant is liable to reimburse the Plaintiff the extra customs duty paid on ACSR. In conclusion, the Plaintiff has proved as required by law that it paid extra customs duty in the sum of Kshs. 30,477,023/- and which duty should be incorporated in the prices payable by the Defendant for the goods supplied. The documentation in proof of the duty paid is comprised at pages 85 to 103 (both inclusive) of the Plaintiff's Exhibit. In the premises and relying on the Plaintiff's submissions foregoing, the Plaintiff prays that judgment be entered against the Defendant as prayed in the Plaintiff.

23. On his part the Mr. Ng'eno counsel for the Defendant submitted that pursuant to paragraph 5 of the Tender Form (page 76 Plaintiff's bundle of documents) the Plaintiff acknowledged that the tender together with the notification of award does not constitute a contract between the parties. It provided that the contract shall be formed when both parties duly sign the contract. This is in conformity with the provisions of Section 68 (3) of the Public Procurement and Disposal Act Mr. Ng'eno submitted that the agreement between the parties executed on 3.05.11 (*page 81 of the*

*Plaintiff's bundle of documents*) and not through the notification of award.

24. The Defendant submitted that the contract was entered into between the parties upon signing on 3.05.2011, and that whereas the contract was entered into more than 30 days after the notification of award, the Defendant's witness testified that no notice was raised by either of the parties regarding the delay. He further testified that the contract was entered into voluntarily and with the mutual consent of both parties in their legal capacities. There was *consensus ad idem* at the point of contracting. In **Vijay Morjaria - Vs - Nansingh Madhusingh Darbar & another [2000]eKLR**, P.K Tunoi adopted the dictum that:

***“...if there is one thing which more than another, public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held as sacred and shall be enforced by courts of justice”***

25. Mr. Ng'eno submitted that having signed the contract over 30 days after notification of award, without raising any notice as regards the delay in signing the contract, and having further proceeded to deliver the goods and accept payment thereof, the Plaintiff herein acquiesced to the delay and is therefore stopped from raising the issue of delay in signing the contract. In examination of the both Plaintiff's and Defendant's witnesses, counsel for the Plaintiff alluded to the fact that the Plaintiff did not date the contract and/or the same was fraudulently dated. The counsel submitted that it is well established that fraud must be specifically pleaded and that particulars of the fraud must be stated on the face of the pleading. The acts alleged to be fraudulent must be set out, and then it should be stated that the acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts. (**Vijay Morjaria v Nansingh Madhusingh Darbar & another [2000]eKLR**).

26. Further, clause 2.29.3 (*page 22 of the Plaintiff's bundle of documents*) provided that the successful tendering party shall date and sign the contract before returning it to the procuring entity. In view of the foregoing, the Defendant humbly submits that in this regard, it would be unreasonable and unconscionable for the Plaintiff to aver that the Defendant unfairly dated the contract, whereas the same was not pleaded nor was evidence of the same tendered by the Plaintiff. The counsel submitted that the contract was valid and that the same was entered into on **03.05.2011**. The Defendant humbly urges that any averments to the contrary are an afterthought on the part of the Plaintiff and prays that the same be disregarded.

27. The counsel further submitted that both the Plaintiff and the Defendant adduced evidence to the effect that the duty as at the time of execution of the contract was 25% pursuant to the EAC Gazette Notice EAC/7/2011 dated 22.03.11 (*Page 83 of the Plaintiff's bundle of documents*). It is therefore the Defendant's humble submission that at the date of contracting, being 03.05.2011 the customs duty applicable to the contract was 25%. That being so, Mr. Nge'no submitted that the Defendant is not liable to pay the Plaintiff for the variation in customs duty. Mr. Nge'no submitted that Section 120 of the Customs and Excise Act, Cap 472 as relied on by the Plaintiff, does not support its claim. To the contrary, the Defendant submitted that full purport and meaning of the provision as cited above, is that variations that take place after the contract has been entered into are the ones that ought to be borne by the purchaser. The Defendant submitted that the provision was intended to protect parties to a contract from a variation of the terms of the contract, after the contract had been entered into. It was not meant to aid a party who was failed to take into consideration prevailing circumstances at the time of contracting. The Defendant submitted that parties are bound by the terms of their contract, unless coercion, fraud, or undue influence are pleaded and proved. Further, it is not within the purview of this Honourable court to vary or re-write the terms of a contract between parties. (**National Bank of Kenya Ltd. vs. Pipeplastic Samkolit (K) Ltd [2001] KLR 112 at p.118** )

The Defendant respectfully submits that Plaintiff herein has neither pleaded nor proved either coercion, fraud or undue influence and further, that the Plaintiff is seeking to use this Honourable court to vary the terms of a contract that it entered into consensually. On the issue of interest, the

Defendant submits that the interest rate of 18% claimed by the Plaintiff is unsubstantiated, and no evidence has been tendered in support of the same.

28. I have carefully considered the submission of the parties and the facts of the case. It is important to provide in this Judgement the sequence of events leading to the dispute herein. The suit tender closed on 07.12.2010, that is, the Plaintiff submitted the tender document fully completed to the Defendant on 07.12.2010. At page 9 of the Plaintiff's Exhibit in Section VI of the table of contents of the tender document is the price schedule for goods. The same to be seen at page 39 (page 36 of the tender document). This is the price list the Plaintiff was required to fill up and return the same to the Defendant for consideration with a view to determining whether the Plaintiff was competitive enough to be awarded the tender. At page 24 of the Plaintiff's Exhibit – (Appendix to instructions to tenderers) item number 3 reference 2.10.2 it is stipulated:-

***“the tender prices for all goods supplied SHALL be on Delivered Duty Paid (DDP) exclusive of VAT, to respective REA stores.”***

Delivered Duty Paid (DDP) simply means that the price quoted by the Plaintiff was to incorporate the customs duty payable on the ACSR. It is the Plaintiff's case that when the Plaintiff submitted its price list for ACSR to the Defendant on 07.12.2010, the rate of customs duty payable on the ACSR and which it incorporated in the price list was computed at the rate of 10% of the customs value being the applicable rate on the Kenya Revenue Authority Simba System at this particular time. Under clause 2.15.1 subject to clause 2.15.2 of the tender document (Page 17 of the Plaintiff's Exhibit), the validity of the suit tender was 90 days from the date of opening of the suit tender, that is, 90 days from 07.12.2010. The tender was therefore valid upto 08.03.2010. Under clause 2.28.1 of the suit tender (Page 22 of Plaintiff's Exhibit) the procuring entity was required to notify the successful tenderer in writing that the tender has been accepted before the expiration of the tender validity. Vide its letter dated 22.02.2011 at page 81 of the Plaintiff's Exhibit, the Defendant duly notified the Plaintiff of the award of the suit tender to the Plaintiff to supply the Defendant with *inter-a-lia* ACSR. The Plaintiff, in turn, signified in writing its acceptance of the award of suit tender vide its letter dated 03.03.2011 contained at page 82 of the Plaintiff's Exhibit.

29. At paragraph 3 of the letter referred to above, the Defendant stipulated that a contract shall be signed by both parties within 30 days but not earlier than 14 days from the date of the letter. Therefore, a simple calculation of days shows that the contract between the Plaintiff (Supplier) and the Defendant (Procuring Entity) had to be signed on or before 23.03.2011 and not earlier than 07.03.2014. This requirement flows from the provisions of clause 2.29.2 of the tender document at page 22 of the Plaintiff's exhibit. A contract for supply of, *inter-a-lia*, ACSR was accordingly executed between the parties and the same is at pages 42 to 80 (both inclusive) of the Plaintiff's Exhibit and the same is dated 03.05.2011, a date that was vigorously contested by the Plaintiff as an incorrect one mischievously inserted therein by the Defendant in an attempt at defeating the Plaintiff's claim herein.

30. The legal instrument that effected the variation of the customs duty payable on ACSR from the previous rate of 10% to 25% of the customs value was the East African Community Gazette Legal Notice Number EAC/07/2011 dated 22.03.2011 (Pages 83 and 84 of the Plaintiff's Exhibit). At page 84 at the top, this legal Notice is indicated to be a corrigendum to the Legal Notice Number EAC/11/2010 (Previous year's East African Community Gazette). Corrigendum in ordinary English means a thing to be corrected. In the table drawn at page 84 of the Plaintiff's Exhibit, ACSR is included at S/N 31 Tariff Code 7614.90.00 description being “other”, S/N 30 Tariff Code 7614.10.00 description being aluminium conductors and cable.

31. Simply, and as can be read in the sentence preceding the table drawn at page 84 of the Plaintiff's Exhibit in the following terms:-

***“A correction is hereby made in Legal Notice No. EAC/11/2010 dated 29<sup>th</sup> June, 2010 by inserting items number 30 and 31 as follows;”***

The Council of Ministers of the East African Countries constituted under the Protocol on the Establishment of the East African Community Customs Union, ratified an additional two items

SN 30 and SN 31 to be added to the Common External Tariff band of goods subject of levy of import/customs duty within member states as contained in the band of goods SN 1 to SN 29 detailed under East African Community Gazette Legal Notice No. EAC/11/2010 dated 29.06.2010 (see pages 35, 36 and 37 of the Defendant's Exhibit filed in court on 14.10.2013). At the bottom of page 84 of the Plaintiff's Exhibit Legal Notice No. EAC/07/2011 is stated that this legal notice is deemed to have come into force on 01.07.2010.

32. The 15% variation of the rate of customs duty payable on the ACSR having been legally effected vide East African Community Legal Notice No. EAC/07/2011 dated 22.03.2011, the Plaintiff vide its letter dated 03.05.2011 (at page 104 of the Plaintiff's Exhibit) wrote to the Defendant requesting for a review of the prices of the ACSR by 15% to cater for the said variation, clearly stating in this letter that the price list submitted by the Plaintiff to the Defendant during the tendering in December, 2010 incorporated a 10% rate of customs duty levy on ACSR, this being the applicable rate of customs duty payable then.

33. Vide its letter dated 16.05.2011 at page 105 of the Plaintiff's Exhibit, the Defendant responded to the Plaintiff's letter of 03.05.2011, communicating its reasons for refusal to vary the prices payable to the Plaintiff on the ACSR. The Defendant gave three (3) reasons, to wit;

0. ***By the time of submitting your tender, the Minister for Finance had announced during his budget speech for the year 2010/11 Financial Year an increment in duty on aluminum conductors with steel core from 10% to 25%.***
0. ***That it was reasonable for you to have factored this increase in duty in your tendered price since the recommendations in the Minister's speech were bound to be effected sooner than later.***
0. ***That notwithstanding the fact that the East African Community Gazette Notice was issued on the 22<sup>nd</sup> March, 2011, the notice is deemed to have come into effect on 1<sup>st</sup> July, 2010.***

34. Vide its letter dated 24.05.2011 (Plaintiff's Exhibit Page 106), the Plaintiff responded to the Defendant's letter of 16.05.2011 strongly objecting to the reasons advanced by the Defendant for its refusal to review the prices on the ACSR as requested by the Plaintiff, the Plaintiff outlining its counter-arguments as follows:-

0. ***A speech by the Minister for Finance cannot be assumed as law, for the speech to be effected as a law there must be a Gazette Notice which was published on 22<sup>nd</sup> March, 2011 and, therefore, the duty becomes effective from that date. Furthermore, a Gazette Notice by Law cannot be backdated as is effective from the date it is published.***
0. ***Customs Duties are paid in accordance with the KRA Simba online system which is controlled by KRA. We have paid all duties in accordance with the Simba Online system which was 10% all along. KRA effected the change of duty from 10% to 25% on the 6<sup>th</sup> April, 2011 which means that the effective date of change in duty is therefore 22<sup>nd</sup> March, 2011 which is the date of the Gazette Notice.***

35. There appears to have been no rejoinder from the Defendant to the Plaintiff's letter of 24.05.2011 and consequently, on 02.12.2011, the Plaintiff wrote once again to the Defendant now seeking a reimbursement of the sum of over Kshs. 30,000,000/- being the extra customs duty paid by the Plaintiff on the ACSR and generally begrudging the Defendant for subjecting the Plaintiff to financial difficulties in respect of the Plaintiff's relationship with its bankers and notified the Defendant that the Plaintiff was in the result hamstrung in its business of delivery of supplies to the Defendant. A further reminder of 05.01.2012 was sent to the Defendant by the Plaintiff (Page 108 of the Plaintiff's Exhibit) after the Defendant failed to respond to the Plaintiff's requests aforesaid. Vide a letter dated 02.04.2012 [Pages 109 – 111 (both inclusive) of the Plaintiff's Exhibit] the Plaintiff's advocates, wrote to the Defendant demanding reimbursement by the Defendant to the Plaintiff of the sum of Kshs.30,477,023/- being the extra customs duty paid by the Plaintiff on ACSR failure to which a civil suit would be instituted against the Defendant. This demand letter jolted the Defendant who vide a letter dated 05.04.2012 (Page 112 of the Plaintiff's Exhibit) wrote directly to the Plaintiff restating its previous reasons for its failure to make good

the Plaintiff's request. It is against this background, that this suit is before you.

36. From the foregoing, there are three issues for this court to determine in order to render a Judgement. These are:-
- i. ***The effect of the Pricelist the Plaintiff filed and forwarded to the Defendant.***
  - ii. ***The effect of the date of contract.***
  - iii. ***The applicable law.***
37. On the first issue above, it is clear that the price list originated from the Defendant, and was to be filed and forwarded to the Defendant. This pricelist would later form the basis of the financial components of the contract. As I have already stated, the tender prices for all goods supplied was to be on Delivery Duty Paid (DDP) exclusive of VAT. What this list reveals without any contradiction is that none of the parties was to benefit from customs duty to be paid. Duty was payable as a matter of course, at the then reigning rate. It also means that at any time duty payable rate changed, the Plaintiff's duty was simply to inform the Defendant of the same, as it was the Defendant who was finally liable for the payment of customs duty. I have noted that any change in customs duty was to be done by the Council of Ministers of the East African Community, and was done vide a Legal Notice which took effect on 1st July 2010. This itself makes it impossible for most diligent importers to have known as far back as 01/07/2010 that the customs duty had been varied by 15%. To insist on that knowledge would be illogical supposition. Going back to the aforesaid pricelist, it follows therefore, and it is the Judgment of this court, that any changes on the applicable customs duty payable was at all times to be borne by the Defendant. This position is supported by Section 120 of the Customs and Excise Act, Chapter 472 of the laws of Kenya which provides:-

***“If after a contract has been entered into for the sale or delivery of goods at a price which includes duty chargeable under Section 117, an alteration takes place in the rate or amount of the duty before the goods are entered for home use or before export duty or excise duty becomes due, then in the absence of express written provision in the contract to the contrary, the contract shall have effect as follows:-***

***In the event of an alteration being the increase of an existing duty, or the imposition of a new duty, the seller, after payment of all the duty payable may add the difference caused by the alteration to the agreed price.”***

38. The Defendant has opposed the applicability of Section 120 of the Customs Act, submitting that it applies to situations where a contract had been entered into before the change in duty rate applicable, and that in the instant case the change in applicable duty took place before the contract was formed. This proposition is wrong for two reasons. The first reason is that the change in customs duty applicable was deemed to have taken place on 1st July 2010 by the said Gazette Notice from the East African Community. This itself was some six months before the Defendant asked for the tender under consideration which closed on 7th December 2010. To impose that kind of knowledge upon the Plaintiff would be unconscionable, unreasonable, unjustified and illegal. The second reason, and this leads me to the second issue I raised herein, is that the parties, especially the Defendant had by its own conduct disregarded the relevance of effect of the contractual date. From the evidence of the parties, and this is not controverted, the contract was supposed to have been signed on or before 23rd March 2011 and not before 7th March 2011, but was actually dated by the Defendant on 3rd May 2011 under mischievous circumstances. Even if the court ignores the said mischievous circumstances, what is clear is that the Defendant had ceased treating the contract date with sanctity, and therefore the date of contract is not of essence. The Defendant had itself championed the process of not honouring the contract date, and so it cannot be the party to benefit by citing a proposition that the Plaintiff is not protected by Section 120 of the Customs and Excise Act. Still on the same issue of the date of contract Mr. Ng'eno for the Defendant submitted as follows:-

***“The Defendant humbly submits that the contract was entered into between the parties upon signing on 3/05/2011, and that whereas the contract was entered into more than 30***

***days after the Notification of Award, the Defendant's witness testified that no notice was raised by either of the parties regarding the delay."***

The natural consequence of that submission is that both parties did not object to the delay of dating the contract, and that indeed the date of contract ceased to be of any essence to the contract herein. In my view the Defendant having failed to honour the contractual dated as per the tender, cannot later on rely on the same to deny the Plaintiff a remedy which is secured by the said date. As i stated earlier the contractual date was never observed by any party and had ceased to be of the essence and so the Plaintiff is protected under Section 120 of the Customs and Excise Act Cap 472 of Laws of Kenya.

39.The Plaintiff claims interest at 18% on the sum claimed. That rate of interest is not an unreasonable demand. The Plaintiff used its own money to pay the customs duty on behalf of the Defendant. The Plaintiff could have invested that money at commercial rates of interest well above the 18% per annum prayed for. I find that the rate of 18% per annum is justifiable in the circumstances.

40.In the upshot, I am satisfied that the Plaintiff has proved its case on a balance of probability, and that the Defendant is liable to pay the Plaintiff the extra 15% customs duty the Plaintiff paid on behalf of the Defendant. Accordingly, therefore, I make Judgement for the Plaintiff against the Defendant as follows:-

- a. ***Kshs.30,477,023 – being extra custom duty paid.***
- b. ***Interest on (a) above at the commercial rates of 18% per annum with effect from 23rd October 2011 until payment in full.***
- c. ***Costs of the suit with interest thereon at court rates from the date of filing of this suit until payment in full.***

That is the Judgement of the court.

**READ, DELIVERED AND DATED AT NAIROBI**

**THIS 18TH DAY OF NOVEMBER 2014**

**E. K. O. OGOLA**

**JUDGE**

**PRESENT:**

Gachura for the Plaintiff

M/s Omolo for the Defendant

Teresia – Court Clerk