REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT MOMBASA

Commercial Civil Case 16 of 2006

RIFT VALLEY PRODUCTS LIMITED.....PLAINTIFF

VERSUS

PLEXUS COTTON LIMITED.....DEFENDANT

RULING

1.The application before me is the Defendant\'s Chamber Summons dated 26th March, 2010. It is brought under Order VI Rule 13(i) (a) (c) and (d) and Order V Rule 21 (f) of the old Civil Procedure Act.

2. The grounds of the application are, first, that the plaint does not disclose a reasonable cause of action in that:

· The cause of action is based in facts founded on the tort of conversion which is not disclosed or pleaded, or alternatively,

· the claim could only be founded on a tort and is time barred under the Limitation of Actions Act.

The second ground is that the Plaintiff has pleaded a cause of action for money had received which is not an action in tort, and is misconceived,frivolous, bad in law or defective and an abuse of the process of court.

3. The application is supported by the annexed affidavit of Nicholas Peter Francis Erlam Managing Director of the Defendant company. It essentially repeats the grounds that the Plaint was served on them pursuant to leave granted by the court on the basis that the suit is founded on a tort committed in Kenya. On the contrary, the deponent believes the Plaintiff has pleaded a cause of action for money had and received which is not a tortious action. The deponent has attached to his affidavit the court order pursuant to which service was ordered.

4. The application is opposed vide the Replying Affidavit of Ramesh Khagram, the Plaintiff\'s Managing Director. He depones that the Plaintiff\'s action is based on the fact that the Defendant wrongfully obtained the Plaintiff\'s goods which were converted into money being the proceeds of sale thereof. Further, that the action brought is for money had and received, and that the same was brought within the time allowed for and is not statute barred under the Limitation of Actions Act.

5. Ramesh Khagram further depones that although the action of *assumpsit* is founded on tortious acts of the Defendant, the Plaintiff had a choice of one of two alternative remedies, either to proceed in tort, or, as it has done, in an action for money had and received.

6. Very briefly, the background to this matter is as follows:

On or about 5th October 1998, the Plaintiff had 200 bales of cotton which were in transit to Dar es Salaam *via* Kenya. They were stolen while in Kenya and acquired by the Defendant, who sold them, along with another 500 bales, to CNLT, Far east BHD of Negeri Sembilan, Malaysia. The Defendant shipped them to CNLT out of the port of Mombasa. The Plaintiff filed suit against the Defendant for money had and received by the Defendant, for use of the Plaintiff.

7. By a plaint filed on 20th March, 2002, the Plaintiff prayed for:

a) US$ 60,773.80 as money had and received by the Defendant for the use of the Plaintiff.

b) Special damages of US $10,665.24 and GB $ 1500

c) Interest thereon at court rates from the date of receipt of the proceeds of sale of the Plaintiff\'s 200 bales of cotton costs"

8. The Defendant being domiciled outside the court\'s jurisdiction, the Plaintiff filed a Chamber Summons application under Order V Rules 21(f), 23, 24 and 25 and Order XXXVIII Rule 5 of the old Civil Procedure Rules. It sought service of summons outside the jurisdiction under Order v Rule 21 (f) which provides:

"Service out of Kenya of summons or notice of summons may be allowed by the court whenever.

…...

(f) the suit is founded on a tort committed in Kenya"

9. The said order was granted by the court on the strength of the averments in the Affidavit of the Plaintiff\'s Managing Director, who deponed, *inter alia a*s follows:

"11. That I also verily believe that the Plaintiff has a good cause of action against the Defendant arising out of wrongful acts of tort committed by the Defendant against the Plaintiff within the jurisdiction of this honourable court... this is therefore a proper case for service of process out of Kenya." *(underlining mine)*

10. I have carefully considered the parties\' submissions and documents availed in this matter. The issues that arise for determination are:

a) Whether the cause of action pleaded by the Plaintiff is is conceived, frivolous, bad in law, defective and an abuse of the court process as not based on facts arising from the pleadings.

b) Whether the Plaintiff\'s action is or can only be founded on the tort of conversion, and if so, whether it is statute barred under the Limitation of Actions Act.

11. On the first issue my analysis is as follows:

A party is bound by its pleadings. The Plaintiff\'s claim is expressly stated as for money had and received. The Defendant, however, argued that the facts upon which the claim is pleaded disclose the tort of conversion. That tort not having been pleaded, the Defendant argues the Plaint is misconceived, bad in law and an abuse of the court process. In addition, counsel for the Applicant says that the plaint in Paragraph 3 avers that cotton was stolen in Kenya and sold, and in Paragraph 7, that the Plaintiff was deprived of the use of 200 bales of cotton. These, he says, are all facts in tort, but the tort itself is not pleaded.

12. Counsel, for Defendant admitted that the Plaintiff could, in general, elect to sue in tort or for money had and received. He, however, thought that in circumstances such as these where the Defendant was not within the jurisdiction, the action could only properly be brought in tort in order to invoke the court\'s jurisdiction.

13. For his position, Defence Counsel relied on **Bullen & Leake**, Section 72, Page 663, which states:

"A Plaintiff cannot abandon his claim in tort and still purse a claim for money had and received which depends on the alleged tort."

This was so stated in **Brocklebank vs The King** (1952) IKB 52 and also applied in **Hardie and Lane vs Chiltern** (1928) I KB 663 at 665.

14. Counsel for the Plaintiff also relied on **Bullen & Leake.** It points out that a claim for money had and received is not an action in tort (**Chesworth vs Farrar** [1967 QB 407). More importantly, the right of action for money had and received is described at page 663 of **Bullen,** as follows:

"A person upon whom a tort has been committed and who brings an action for the benefits received by the tortfeasor is sometimes said to waive the tort. The election to bring an action of assumpsit is not, however, a waiver in the sense of affirming it as rightful, but is a choice of one of two alternative remedies (United Australia Bank vs Barclays Bank [1941]AC 1 at page 18 up to judgment, the Plaintiff may pursue both remedies together, but he can take judgment only for the one and his cause of action will then be merged in the one (ibid at 30)....

Thus, where the Plaintiff\'s goods have been wrongfully obtained by the Defendant and converted into money, the Plaintiff may waive the tort and sue for the proceeds as money received for his use."

15. The **Brocklebank** case, on which both counsel relied, requires further analysis. There, the Shipping Controller purporting to act under authority of the Defence of the Realm, required the suppliants to sell one of their ships to a foreign firm, as a condition of a licence, and pay a percentage of the money to the Ministry of Shipping. The suppliants paid the percentage. They then petitioned to recover back the money so paid. In holding that the Plaintiff could not waive the tort of illegal exaction and sue for money had and received, the court noted that the cause fell within the exceptions to statutory provisions.

16 As such, the decision in **Brocklebank** was, in my view, confined to the language of the particular statute. It is thus unnecessary to consider whether it has any direct application to the present case. In **Brocklebank**, the Crown argued, as does the Defendant here, that the main and necessary constituent of the cause of action is tort; and that unless the supplicants pleaded (as they indeed did) and proved this tort, their action must necessarily fail. Scrutton LJ in **Brocklebank** discussed the principles on an action of *assumpsit* that help give clarity in the present case.

17. In his speech in **Brocklebank** Scrutton LJ quoted Sir John Salmond (On Tort) 4th Edition, Page 162, as stating the following principle in respect respect of action *assumpsit:*

"There is, however, one rule which may be laid down with confidence, when the Defendant has by means of a tort become possessed of a sum of money at the expense of the Plaintiff, the Plaintiff may sue either for damages for the tort or for the recovery of the money thus wrongfully obtained by the Defendant, and this latter action (an action for money had and received by the Defendant to the use of the Plaintiff) is based on an implied contract of agency, the Defendant being fictitiously assumed to have rightfully received the money as the Plaintiff\'s agent, and to have failed to pay it over to his principal." *(underlining mine)*

18. My understanding of this case is that whereas an action in *assumpsit* may be founded on

tortious facts, it is open to the Plaintiff to elect to sue either in tort or for the recovery of the money wrongfully obtained by the Defendant. The action in that event is based on an implied contract fictitiously assumed.

19. In the present case, it is abundantly clear that the Plaintiff was awake to the fact that it must make an election. And so it did not plead in tort, but prayed for money had and received, although the factual allegations disclosed actions emanating from tort. Just as the doctrine of money had and received rests on a fiction of a promise implied in law, the Plaintiff in this case relied on factual elements in its pleading tending to show the claim was founded in tort, without pleading tort as the cause of action. This was, apparently, to pre-empt the suit from falling victim to the statutory time bar. The plea of tortious acts in this case was, I believe, a ruse craftily engineered by the Plaintiff to enable it achieve service outside the jurisdiction. This it achieved through a chamber summons application. The order granted was, in my view, erroneous, but that is water under the bridge. Further, the court\'s order, granted for service outside the jurisdiction, was not appealed from.

20. With regard to the Defence argument that the Plaintiff cannot abandon his claim in tort and still pursue his claim for money had and received, (See **Hardie and Lane vs Chiltern [1928] 1KB 663** at 695), I think the above quotation from Salmond clarifies the point. The Plaintiff was entitled to claim in both tort or for money had and received. He elected the latter. Having not pleaded tort he could not have abandoned it. That is what the Plaintiff sought to do in **Hardie** .

21. In **Hardie\'s** case, the Appellants had sued citing multiple causes of action. In fact, the Plaint disclosed three causes of action: for conspiracy, libel and money had and received. It was argued by them that even if they did not succeed in tort or waive their claim in libel, they should succeed on contract. Lord Hanworth, MR, there stated:

"The third claim for money had and received depends upon whether the Plaintiffs can abandon the tort...which is alleged to form the basis of the acts and things thereafter charged... In my judgment the Plaintiffs are not entitled to so vary their claim. On the facts alleged, the cause of action stands upon conspiracy and duress and it is not possible for the Plaintiff\'s to disassociate their clam from those facts and rest it upon a money claim only.

22. In this case, as I said earlier, there is no attempt to vary the claim. Nor is there anything unlawful in the Plaintiff relying upon tortious facts to found his claim for money had and received, as **Brocklebank** permits such election.

23. I can now answer the first issue on the basis of the foregoing discussion. I find that the Plaintiff\'s cause of action is neither misconceived nor an abuse of court process. On that limb the application fails.

24. The second issue is partially answered in my discussion on the first issue. The Plaintiff\'s action was founded on facts disclosing the tort of conversion. The Plaintiff elected, as it was entitled so to do, to claim for money had and received. The fictitious implied contract thereby crystallised although the foundational facts are also tortious. This is my understanding of the passage in **Salmond** quoted by Lord Justice Scrutton in **Brocklebank.** To that extent, the Plaintiff\'s action, not being in conversion, was not statute barred. This limb of the application also fails.

The upshot of the foregoing discussion is that the application fails, and is hereby dismissed with costs to the Respondent. I direct that this matter, now running ten years since filing, shall proceed with expedition to full hearing.

Dated, signed and delivered this …20th.....day of September....2012

R.M. MWONGO
JUDGE
Read in open court
Coram:
1. Judge: Hon. R.M. Mwongo

2. Court clerk: R. Mwadime

In Presence of Parties/Representative as follows:

a)…….....
b)…….....
c)…….....
d)…….....