



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA**

Civil Suit 365 of 2000

SUPERMARINE HANDLING SERVICE LTD. PLAINTIFF

- Versus -

THE COMMISSIONER GENERAL

KENYA REVENUE AUTHORITY DEFENDANT

Coram: Before Hon. Justice Mwera

Wanyonyi for Plaintiff

Kahindi for Mutuku for Defendant

Court clerk – Kazungu

J U D G M E N T

The matter about to be set out below, was started off with Onyango Otieno J, as he was then, partly hearing the plaintiff company's managing director (Solomon Gerald Ngwatu Chula Nzano P.W.1) who completed his testimony before the undersigned. The defence case was then heard and both sides submitted.

The other aspect is that the principal pleadings were amended and the court will rely on the plaint amended on 13/9/2000 and the amended defence dated 25/9/2000. Seemingly no issues were drawn up and filed/recorded jointly or severally, or as per the submissions. It is also added that the case is some 5 years old. However, despite the above all the best endeavours will be put in hand to determine the dispute in issue.

The plaintiff company averred that it was the owner of containers measuring 20 x 20 ft. They contained condemned Indian rice which the plaintiff bought on 28/11/98 at Sh. 1.2m. That after the plaintiff paid all requisite dues, the defendant authority refused to release the goods to it.. It filed MBA HC Misc. Case No. 65/1999. The goods were then released on 22/11/1999. But that due to the unlawful detention by the defendant between 19/11/1998 and 22/11/1999, the plaintiff suffered loss and damage. Thirteen particulars constituting this loss were set out in detail bringing out a total of Sh. 23,973,305/=. That five (5) containers were unlawfully seized by the defendant and held in a Buxton godown for 12 months at a rental of Sh. 100,000/= per month. That 2116 bags of rice the 5 containers had, were damaged and the total loss was stated. The other item concerned transporting those bags for destruction. That four (4) containers carrying 1880 bags of rice were found empty and so the goods' value was claimed. It was not said whether five containers damaged/destroyed were the same ones alluded to either or were a separate lot. But loss was said to have been occasioned by their destruction and damage. Another loss arose from demurrage for 15 containers, waiting and transportation charges, port storage charges, KPA late

documentation charges (three items), other destroyed/damaged bags and the advocates fees paid in MBA HC MISC.C 65/1999. So the plaintiff sought to recover a total of Sh. 23.9m (as detailed above) plus costs and interest.

By the amended defence the defendant authority claimed that the plaintiff's claim was res judicata and that that would be taken up at the outset. Probably it was, or it was not considering that a full trial was conducted. That the rice was so rotten that it could not be used even to feed animals. It was added that the detention of the rice was because the plaintiff did not pay what was termed "Customs Tariff Classification". All loss/damage claimed was denied and or that if the plaintiff suffered any loss/damage it was not caused by the defendant. It was added that the plaintiff failed to mitigate its loss, when it did not secure a reasonably cheaper and safer storage facility and that it failed to collect its goods from the port on 24/9/1999 when a ruling (in Misc.C No. 65/1999) mandated it. Before Onyango Otieno J, P.W.1 said that his company bought the subject rice at Sh. 1.2m (ExhP1). After that purchase the plaintiff requested the defendant on 3/11/1998 (ExhP2) to be allowed to move the goods to some spot to sort them out. That was granted (ExhP3). That the rice for which tax was to be paid was valued (ExhP4, 5) and Sh. 305,000/= was paid (ExhP6). This was followed by documentation, paying port charges etc (ExhP7, 7a) followed by release orders (Exh P8, 8a, 9, 9(a) (b)). Five lorries were hired to move the goods and on 19/12/1998 fifteen (15) containers were loaded. At gate No. 10 the duty was found to have been undervalued. However 5 containers were released but were escorted to a go-down by a customs officer, sealed and thus they became arrested. That to get them out P.W.1 travelled to the defendants' offices at Nairobi and he met several senior officers there. That was in July 1999. That when he returned to Mombasa, health officers took samples of the rice, analysed it and certified that it was fit for animal consumption (Exh P10). That P.W.1 desirous to get the rice was turned off by the Commissioner of Customs even after all that, so the plaintiff filed Misc.C No. 65/1999. A ruling releasing the goods followed on 24/9/1999 (Exh P11) and it was served on the defendant on 18/10/1999 (Exh P12). That the defendant still detained the goods until it was threatened with contempt proceedings. The goods were then released on 4/11/1999 (Exh P13). By this time the goods had deteriorated so much that an entity called SGS certified them not even fit as animal feeds (Exh P14). That the Government Chemist also found the rice to be so (Exh P15). So the plaintiff sued to recover what has been set out above earlier. P.W.1 further tendered evidence of payments made to a body Panty (or Pawty?) Hose Manufacturers Ltd. Sh. 1.2m (Exh P16); Sh. 2.04m to transporters (Exh P17) (a) (b) (c) (d) and added that the goods had a value of Sh. 8,707,700/=. The purchase agreement (Exh P18) was also produced.

Before the undersigned P.W.1 said that his company got the 15 containers from M/S Inchcape Shipping Services and had them for 360 days @ US \$ 25 per container in all US \$135,000 which the container owner was demanding (Exh P 19 A, B). So all the particulars put together added up to the Sh. 23,973,305, as per the plaint.

In cross examination, P.W.1 said that the claim before court concerned twenty (20) containers of rice which rice the plaintiff bought on 28/11/1998 from Inchcape Shipping Service for Sh. 1.2m. That the rice was to be sold to M/S Wama Feeds of Thika at Sh. 2.37m which was corrected to Sh. 8.7m when the witness went over a letter dated 12/10/1999 (Exh P 18). The witness then said that Wama would pay Sh. 2.3m for the rice (?) but when this saga began Wama withdrew. That it was a new buyer who offered Sh. 8.7m for the rice. P.W.1 repeated that the rice was bought on 28/11/1998 and it was released on 4/11/1999 adding that there was probably some confusion about these dates.

To P.W.1 KPA managed all the sheds at the port and their containers were in shed No.5. That when they were released the defendants' preventive officer was present although he did not record anything about this release.

And that the 15 containers were released on orders of the court. P.W.1 answered that the contents of 5 containers at Buxton go-down(s) were destroyed in the presence of municipality officials, even if P.W.1 had nothing to evidence that. That he hired the Buxton go-down on 4/12/1999 from the owner for Sh. 1.2m (invoice Exh P16) yet to be paid. The court heard that the 5 containers were stored under customs seizure although P.W.1 was not issued with any notice of seizure.

Looking at the plaint (para.5 (iv)) the witness told the court that 4 containers were found empty at shed No.5 where all the time they were under the custody of customs officials.

That P.W.1 had paid Sh. 508,770/= to the ports authority for storage. P.W.1 could not see how that authority would be liable for this loss because the defendant was the party that barred the plaintiff from moving the goods out. It detained them under its authority.

That the plaintiff was obliged to pay Inchcape \$ 135,000 (Sh. 10.12m) – a debt it had pleaded for time to clear.

As to transport receipts which P.W.1 said came from the same book, he was unable to explain why for instance receipt No. 304 was issued on 21/3/2000 while No. 306 was issued on 21/2/2000. It was not the issuer who produced these receipts though.

P.W.1 claimed that the value of the rice rose from Sh. 1.2m at the time it was bought to Sh. 8.7 claimed because the plaintiff bought with a view to sell it by bids. And that each bag of rice delivered at Mwea would cost Sh. 950/=. While some of the receipts P.W.1 was producing bore sums of over Sh. 100/= they did not carry the revenue stamps for any receipt for payment of over Sh. 100/=. P.W.1 maintained that the goods were kept at the warehouse(s) over which the defendant (customs department) had control. And that demurrage was yet to be paid. Jeremiah Mailutha (D.W.1) an officer with the defendant's customs department was stationed at the Southern Region Headquarters as an assistant Commissioner of Customs during the period in question.

On 19/12/1998 he received information that some five (5) containers were about to leave the port gate No.10 seemingly being smuggled out. That D.W.1 proceeded to the said gate, found the 5 containers and demanded for their clearance papers. That before they were opened the witness noticed water dripping from them. On opening the containers Mailutha witnessed bags of rotten rice full of maggots. That he saw a letter of 6/11/1998 (Exh. P3) signed by a Mr. Jamesa of their office to the plaintiff company alluding to twenty (20) full container loads containing condemned Indian rice. And the rice he saw in the 5 containers was condemned. That he himself had written to the plaintiff on 16/11/1998 (Exh. P4) saying that in whatever state the rice was it could be valued and due taxes paid. And that another letter (Exh. P5) from another colleague read that 4 containers had rotten rice. That D.W.1 noted all these in the presence of Mr. Ngwato (P.W.1). That P.W.1 told D.W.1 that the rice was being taken to their go-down at Buxton to sort out the bad rice from the good lot. There was nothing wrong with that and the papers P.W.1 had were in order. So D.W.1 allowed the 5 containers to leave the port – and this was on 19/12/1998. That the witness was not aware of any seizure of the plaintiff's rice on its way from the port to Buxton. There were no usual seizure papers filled a copy of which the goods owner would retain. And that no seizure of any rice was reported to D.W.1 who at that time was the overall boss, his senior being out of the office.

Mailutha added that because due authority (Exh. P3) was talking of 20 containers and only five were at the gate, the other 15 could have been at the port. He did not see them. He could not thus say in which condition those 15 containers were or even whether they contained rice. D.W.1 told the court that the relevant law (S.9 KPA Act) mandated KPA to manage the port. But customs officers were present in the sheds at the port to assess goods and collect taxes. From the state of the rice in the 5 containers, D.W.1 doubted even if it could fetch half the sum the plaintiff was seeking in this suit.

D.W.1 doubted whether the goods claimed ever came into the defendant's possession, because the plaintiff's goods were in sheds Nos. 1 to 9. That whenever goods were found damaged, the defendant nonetheless prepared the usual documents and due levies were raised. The goods owner was obliged to pay these and could return and seek a refund.

That condemned goods had nonetheless to be destroyed in the presence of government officers and a requisite certificate produced. He produced a standard form (Exh D1) – authority for destruction of condemned goods. If it is not furnished then the goods cannot be said to have been destroyed. D.W.1 denied the claim for 180 bags on the basis that they never came into the custody of the defendant. Their warehouse officer did not acknowledge such custody by signing a relevant document.

Looking at the deputy Commissioner's letter dated 4/11/1999 (Exh. P.13) the witness said that the plaintiff's lawyers were being informed that the defendant was not holding any goods of the plaintiff. And that if the defendant did not withhold the rice, the plaintiff was not prevented from taking it away.

In cross examination D.W.1 repeated that when he went over to the 5 containers at the gate, he found that due taxes had been paid and he released them. Referring to the ruling (Exh. P11) in Misc.C No. 65/1999, D.W.1 doubted whether the rice had been held up due to non-payment of a large portion of duties, and to him, that is why on 4/11/1999 the deputy Commissioner wrote to say that no duty was owed and no goods were being detained. Then he added that by Exh. P12 the order to release 20 containers meant that defendant had them. Mailutha went on to reiterate that after taxes were paid, there is no evidence that the defendant continued holding the rice. That the goods were not under the defendants' custody while in a go-down at Buxton and there is no seizure notice to say so. D.W.1 could not speculate on what led to the delay that resulted in any damage – not KRA.

Each side submitted and generally there was not much dispute as to the containers and the condemned rice. The plaintiff maintained that all the particulars of loss had been proved. And that by virtue of the court order in Misc.C No. 65/1999 that led to the release of the goods order on 4/11/1999, it must be taken that the defendant detained the subject goods until their condition deteriorated to a level where they could not even be fed to animals. Mr. Wanyonyi reviewed the pleadings and the evidence but remained holding the position that the defendant was liable. That the plaintiff relied on a court order to release the goods but that the defendant by "unlawful seizure and detention of the plaintiff's goods" occasioned the loss/damage claimed. That the plaintiff did not only incur charges and other expenses but it also lost a business opportunity with M/S Bekas Ltd. who had contracted to pay Sh. 8,707,700/= for the goods. To support this, MBA HCCC 114/2001 BAHATI JEAN VS KRA was cited to the effect that a party who loses a business opportunity because of an unlawful seizure of goods by the other should be given relief. And that MBA HCCC 14/1999 MOMBASA DEVELOPMENT & ANOTHER VS THE A.G & OTHERS (had) said the same thing. Another case which Mr. Wanyonyi cited did not clearly appear to this court as to what import it carried (The Hedly Byrne Case), relevant here.

The defence side similarly went over the pleadings and the evidence. Mr. Mutuku however was however left in confusion and doubt by the plaintiff's evidence which seemed to centre on the 5 containers allegedly seized and detained by the defendant at Buxton while nothing is said about the fate of the 15 other containers left at the port. His submission was that Mailutha (D.W.1) released the 5 containers at the port gate to the plaintiff's witness (Ngwatu P.W.1) because there was no reason to detain them. That at no time was the plaintiff's containers under seizure. Mr. Matuku went over all the 13 particulars of special damages and concluded that they were not specifically and satisfactorily proved to be made bases of the award sought. He sighted the cases of KARIUKI VS E.A. INDUSTRIES LTD. NRI HCCC 1414/1980 KENYA SHELL LTD. VS KIBIRU & ANOTHER [1986] KLR 410 and HAHN VS SINGH [1985] KLR 716.

With that out-line of the pleadings, evidence and submissions, this court takes the liberty to set out some three or so broad issues to be determined:

- (1) In how many containers were the plaintiffs goods subject of this suit – five (5) or fifteen (15) as per the evidence?
- (2) When, where and how many containers were detained/seized by the defendant?
- (3) Who stored goods at Buxton and on what terms?
- (4) Which goods were damaged/destroyed, by whom and worth how much?

In endeavoring to determine the above, any other aspects of the case will no doubt be touched on as we progress through. It is however pertinent to set out from the beginning that the plaintiff's claim is basically for special damages and particulars have been set out in the plaint as they should be. It is by also specifically proving each item of special damage that entitles a claimant to relief. The claim here is

hinged on the basis that “the defendant refused to release the said goods to the plaintiff ... (whereof) the plaintiff suffered loss and damage due to unlawful detention by the defendant of the said goods between 19th November 1998 to 22nd November 1999” (see paras. 4, 5 amended Plaintiff).

And Mr. Wanyonyi repeated the same in his submission:

“The defendant being in a position that he knew and judgment (sic) was being relied on in (sic) part of Customs & Revenue requisite to the release of the plaintiff’s cargo over stepped their authority. This led to the unlawful seizure and detention of the plaintiff’s goods by the defendants and or agents and which has occasioned the great financial loss to the plaintiff.”

The court deciphered the above simply to amount to the sum that the defendant authority’s unlawful seizure/retention of the plaintiffs goods led to it suffering loss and damage.

ISSUE 1: The number of Containers Involved:

The plaintiff says this:

“3. At all material times the plaintiff was the owner of 20 x 20 feet containers ...”.

Does this mean more than one container measuring 20 x 20 ft each or 20 containers of 20ft? Particulars of loss refer to 5 containers, 4 containers, 5 containers, 15 containers etc and the aggregate exceeds twenty five containers!

And P.W.1 said:

“We hired 5 lorries On 19/12/1998 we loaded 15 containers into the lorries. When we reached gate No. 10 we were informed by Customs Officer that the duty paid was undervalued. After agreement with them, they allowed us to take the 5 containers escorted by security officers of customs.

They were taken to the go-down and were sealed, meaning goods were under arrest. The go-down was under the care of customs. The other containers were left at the ... put under customs care.”

It was added that on the following Monday he went to see a senior customs officer Mr. R.J. Malura who told him to go and sort out his problem at the defendants Headquarters in Nairobi.

Malutha’s (D.W.1) evidence is that on this 19/12/1998, he was informed that containers were about to be smuggled through gate 9/10. He went there and saw five (5) containers filled with extensively rotten rice loaded on 5 lorries. When he ascertained that duties had been paid and proper papers were in place, he allowed P.W.1 to take his goods away. His evidence even in cross-examination centred around five containers only.

It was not suggested that there were in fact twenty of them and 15 were left at the gate when 5 were allowed to go. But at least both P.W.1 and D.W.1 are agreed that 5 containers were released to leave the port on 19/12/1998. But P.W.1 does not say who took and where the other 15 containers went. It is simply put that other containers were left under customs care. At the gate? Returned to the sheds? By who and on what documentation?

From P.W.1’s evidence the 5 containers were taken under security of customs officers to a go-down (at Buxton); they were thus under arrest. For what if Malutha (D.W.1) maintained that these 5 containers were released with no condition since taxes on the contents had been paid and papers were in order? D.W.1 denies that they were seized because there was no reason to do so and there was no due seizure notice. The plaintiff did not produce any. However before 19/12/1998 correspondences between the plaintiff and the defendant show that twenty (20) containers were involved e.g. the plaintiff’s letter of 3/11/1998 (Exh. P2) requesting the defendant to allow it to sort out the rice and the consent given on 6/11/1998 (Exh. 3) by the defendant. The duties were paid on 16/11/1998 (Exh. 6) Sh. 305,000/=.

Then recourse was made to the court's ruling of 24/9/1999 in MISC. CASE 65/1999. It was found that 5 containers were released but held and sealed by the defendant at a go-down in Buxton. Nothing was said of the whereabouts of the other 15 containers. But if the said ruling is not in-correctly interpreted, the defendant was directed to release the entire 20 containers of rice to the plaintiff company. That the defendant did not do so right away until threatened with contempt proceedings. It released the goods on 4/11/1999.

Apparently the plaintiff did not collect the goods. On 10/11/1999 it asked the M/S SGS (Kenya) Ltd. to inspect the goods. They were lying at KPA's yard No. 5/6. They were found unfit for animal consumption – all 20 containers (Exh. P14). But the P.W.1 testified that five (5) containers were already at a Buxton go-down. So which number of containers were at what location? Is the plaintiff honestly telling the court where the containers were at what time? By 16/11/1999 when M/S SGS inspected the goods in 20 containers were they all at the KPA yard or some 5 containers were at Buxton?

And on 27/1/2000 when the government chemist (Exh. P15) also inspected/ analysed the rice, where was it and in how many containers? It was again found to be totally unfit for consumption by man or animal. It was to be destroyed immediately. From all the above this court is unable to determine how many containers were exactly involved. While SGS inspected 20 Full Container Loads (FCL) at KPA yards 5/6 and found the goods too bad for any consumption, and the government chemist also came to the same conclusion without it saying in how many containers the rice was, yet the plaintiff had told the court that already 5 containers were at a go-down at Buxton. Or the discrepancy was not explained – hence the conclusion that it has not been possible or with a degree of certainty to say how many containers had the rotten rice.

ISSUE 2: When, where and how many containers were detained by the defendant: From the ruling of 24/9/1999 all 20 containers were involved. That ruling and P.W.1 said that 5 containers were held under customs control at Buxton. Although P.W.1 did not say how and where 15 others were left (at the KPA gate on 19/12/1998?) it can be assumed that they were at shed No. 5 and 6 where M/s SGS inspected them (in all, 20 of them!) on 16/11/1999. That in Misc. 65/1999 the court ordered that all 20 containers be released to the plaintiff by the defendant then we should presume that the defendant was having control/custody of the same. It is no matter that a formal seizure notice was not served on the plaintiff. But surely the plaintiff ought to have insisted on such official document. It did not and no explanation was given to this court. So what actually happened? Were the goods held by mere show of official power and authority or did the defendant formally hold onto these goods? Yet the court could not direct as it did on 24/9/1999 without being satisfied with the complaint as put before it by the plaintiff. But as at that time, evidence was not heard. Now it has been. It can thus be deduced that the period of alleged unlawful detention of the goods was between 19/12/1998 (not November) and 4/11/1999 when P.W.1 told the court that their goods were released. And despite the discrepancy above, 15 containers remained at the port while five were at a Buxton godown.

The plaintiff claimed that the detention was always with the direction and control of the defendant. If that be so, even without evidence or an invoice from KPA to the plaintiff over the storage of 15 containers at sheds No. 5/6, the court finds difficult in believing that the 5 containers were sealed and stored at Buxton on orders of the defendant. There was no evidence of seals or warehousing at the go-down. Indeed the plaintiff came up with Invoice No. 178 from M/S Panty Hose Manufacturers Ltd. that its stores were hired between 1/11/1998 to 31/11/1999 to keep the plaintiffs 20 containers at Sh. 100,000/= p.m. – total Sh. 1.2m. Could the defendant keep seized goods at a private go-down at the cost of the importer/owner of goods? Such arrangement if it exists in the dealings of the 2 litigants here was not explained and the court cannot accept that that was the state of things. In any event, has it not been found that 15 containers always remained at the port? Is the plaintiff being forthright with this claim?

Hardly.

ISSUE 3: Who stored 5 containers at Buxton and on what terms? Definitely not the defendant and it has not been shown that the defendant directed such storage and sealed the containers. There is just no evidence to support that.

ISSUE 4: Which/How much of the rice was damaged and at what loss: The plaintiff seems to lay claim on the contents of 20 containers. It cannot be. While 5 containers were at Buxton M/S SGS certified that all the rice in 20 containers lying at yard No. 5/6 of KPA was unfit for animal consumption. It has already been found that that could not be. SGS did not visit Buxton to inspect the 5 containers lying there. Or at least it did not say so. The government analyst did not say where he inspected the rice and how much it was. It is thus not possible to say how much rice was so damaged as not to be sold for animal consumption.

The plaintiff claimed that in fact all the rice was so bad that it was destroyed in the presence of municipal officers. The date of such destruction and due certificate (on form REF K/DEST/ 1-/2000 Exh. D1) was not produced. Or any certificate for that matter. So can it be concluded that all rice was worthless and so destroyed? Not with the evidence before court.

From the above the following is the court's determination on an item by item basis constituting special damages:

(i) Five (5) containers stored at Buxton: - Sh. 1.2m: This sum will not issue first because it was not proved that the defendant ordered or controlled such storage. Secondly, the invoice by M/S Panty Hose (Exh. 15) asks for the same total Sh. 1.2m but for twenty (20) containers! No certainty in the claim.

(ii) Contents of 5 containers at Buxton damaged: Sh. 2.01m. There is no evidence that the rice in those containers was damaged because the defendant ordered it to be stored there at it deteriorated. There was no certificate about its condition. So the plaintiff could as well have sold it when it was released to it on 19/12/1998 by Mailutha (D.W.1).

There was no evidence that the contents of these 5 containers remained "detained and sealed" by the defendant.

(iii) Transporting bags of rice for destruction – 600,000/=. There was no evidence that any rice was ever destroyed.

(iv) Four containers found empty – Sh. 1.7m: This is totally unsupported by evidence of P.W.1. He said:

"The goods were not immediately released. Goods were released when we came back to file a contempt of court order (sic) against Commissioner of Customs. They were released on 4/11/1999."

There is nothing to show that any 4 containers were empty or at what point in time they were empty. But no container would have been empty because when M/S SGS inspected 20 containers at KPA yard 5/6, it did not say that any was empty. Samples were taken from selected bags in the containers.

(v) Five (5) containers were damaged (or had their contents damaged) during 12 months – Sh. 2.2m: It is not said which five containers are they different from those at Buxton? (see item 2 above) or part of "the twenty" at the port? Leave it at that? Certainly.

(vi) Demurrage for 15 containers: Ksh. 10.1m: On 5/1/1999 (Exh.P19 (b)) M/S Inchcape Shipping Services asked that it be paid US \$ 25 per container per day w.e.f. 12/1/1999 on the 15 containers that had not been returned to them. This means that of the 20 containers the plaintiff had bought full of rice from M/S Inchcape, five had by 5/1/1999 been returned. Could these five be the ones Mailutha (D.W.1) released to the plaintiff on 19/12/1998? Probably. But by 16/11/1999 M/S SGM was inspecting 20 FCL (i.e wenty full container loads) and M/S Panty Hose had stored a similar number, 20 FCLs in its go-down between 1/11/1998 and 31/11/1999! Come to think about it again, what would the containers be doing in this godown on 31/11/1999 when all goods were released on 4/11/1999 when contempt proceedings were threatened? Anyway if this item be awarded, it will involve only 15 containers between 21/12/1998 and 4/11/1999 @ US \$25 per day. That can be

calculated and so the correct sum is granted.

(vii) Waiting & Transportation charges – Sh. 1.4m: This item will not be allowed.

The court is highly doubtful about the four receipts issued by M/S Banner Kenya Ltd. (Exh.P 17, A, B, C, D):

No. 302 - 28/1/2000 - Sh. 440,000/=

304 - 24/3/2000 - Sh. 500,000/=

306 - 21/2/2000 - Sh. 500,000/=

309 - 14/4/2000 - Sh. 600,000/=

Sh. 2,040,000/=

The evidence exceeds the claim laid. No problem. It was put to P.W.1 and he agreed that these receipts appeared to have come from the same book series. But he could not explain why No. 304 was issued on 24/3/2000 while No. 306 came out on 21/2/2000. He only said that he was not the maker of the receipts and he could not explain this. He did not call the maker though, and in any case the receipts did not bear the revenue stamps required on any receipt of Sh. 100/= and more. This claim was considered premised on unreliable evidence and thus rejected.

(viii) 6 containers storage charges for 12 months – Sh. 508,700/=: The plaintiff produced Exh.P7, 7A, B. The evidence was that: “After paying duty we lodged documentation for payment of port charges etc. We also paid Kenya Ports Authority charges – storage charges. I produce all these documents. They are Exhibit 7 showing handling charged for fees reached(?)”

Under this item the plaintiff noted MPRO No. 478226 (Exh.P7). It describes the goods as 10 x 20 ft containers. It has 10 containers stated thereon. Exhibit 7A is a receipt for Sh. 508,770/= by KPA dated 9/12/1999, Exh.P7B is headed “shore handling charges for services rendered”. Some five items, apparently numbered containers, are listed size 20.

Reasons of charges are:

“Stripping in port area house – house containers PRO 476235 –“

PRO 476235 is Exh.P9, for 5 containers therein stated. The court was not told in evidence first, why this item is claimed and two, when it speaks of 6 containers and the PROs (assumed to mean port release orders) speak variously of ten and five containers.

Then the charges are not for storage. They are for “stripping in port area, house – house container”, whatever that means.

It is incumbent upon he who pleads to prove, and clearly so. All the above does not explain to this court. What the plaintiff company meant or wanted. The court is thus unable to grant it.

The same goes for items

(ix) to (xi) – KPA late documentation. Yes. What about it? And what is to be done? Seemingly nothing.(xii) 6 containers – 2820 bags destroyed and damaged – Sh. 2.6m: Still part of the 20 containers or a different lot? Why put it in separate items for special damages? Not clear as to what was meant or sought.

(xiii) Advocates fees in MISC. CASE No. 65/199 – Sh. 575,000/=.

This can be appropriately dealt with in that cause during taxation.

In the result that save for demurrage charges for 15 containers at US\$ 25 per day per container w.e.f. 12/1/1999 to 4/11/1999, the rest of the claim is dismissed with costs.

Judgment accordingly.

Delivered on 30th September 2005

J.W. MWERA

JUDGE