



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL SUIT NO. 124 OF 2001

RANFER COMPANY LTD.....PLAINTIFF

VERSUS

THE COMMISSIONER OF CUSTOMS & EXCISE & ANOTHER.....DEFENDANTS

JUDGMENT

In this case, M/S Ranfer Co. Ltd , the plaintiff, has sued the Commissioner of Customs and Excise and the Kenya Revenue Authority , seeking damages for losses it suffered as a result of alleged frustration to its contract for the export of petroleum products to the Democratic Republic of Congo in 1998.

In the plaint filed on 20th April, 2001 it was averred that during 1998 the plaintiff secured a permit from the Ministry of Energy to export petroleum products from Kenya to the Democratic Republic of Congo after they had entered into a 6 months contract with one Etienne Basimaki Bakabona for a supply of a minimum of 60,000 litres a week of petroleum products to designated customers in that country. The plaintiff further averred that it procured all the necessary documents for the said export including a contractual bond with the 1st defendant and paid all the taxes due on such export. Thereafter the plaintiff averred that it bought 60,000 litres of super petrol from M/S National Oil Corporation at Kisumu and procured the services of one Suleiman Nasoro a driver of a truck reg. No. TZF 8000/TZE 5740 to transport the said fuel but the said vehicle could carry only 58,000 litres. The plaintiff averred that thereafter the said truck set off in a convoy of other trucks for Busia on its way to D.R. Congo after being loaded with 58,000 litres but shortly later on the defendant's agents and / or servants caused the said motor vehicle with its contents to be seized, vide, seizure Notice No. 032317 of 3rd December 1998 on allegations that the truck was ferrying uncustomed goods. The plaintiff further pleaded that following an order of the Chief Magistrate's Court Kisumu in Miscellaneous Civil Application No. 30 of 1998, the said truck with its load was released unconditionally to proceed with its journey to its destination but once again the 1st defendant's agents detained the vehicle and its load at Kisumu pier vide Notice of Deposit No. 0243315 dated 9th December 1998 on the pretext that an appeal against the court's order had been lodged but no such an appeal was ever made. The plaintiff averred that thereafter the driver of the truck was taken to Vihiga SRM Court where he was charged. However on 1st February he and those with whom he was charged were acquitted but when the truck was eventually released to the plaintiff it was discovered that 28,000 litres of 58,000 litres of petrol worth kshs. 294,000/- was lost through leakage. That development necessitated a hire of another lorry to transport the remaining fuel to DRC as had been planned. The plaintiff averred that the contract it had procured for export of petroleum products was eventually cancelled for its failure to supply the products as agreed due to the defendant's frustrations having incurred heavily lossess.

On 23rd August 2001 the defendant filed a joint statement of defence in which they denied the plaintiff's

claims but they admitted that the said truck was seized under section 199 of the Customs and Excise Act. The defendants further averred that they were acting within the scope of their statutory duties and in good faith in that the said vehicle was found on an ungazetted route. They further denied that they acted maliciously and unlawfully as claimed. The defendants attributed the losses incurred by the plaintiff to the negligence of the driver of the truck reg. No. TZF 8000/TZE 5740.

When the case eventually came up for hearing the plaintiff called four witnesses and the defendants called two.

Mr. Luka Kipkorir Kigen the plaintiff's managing Director who testified as PW1 said that his Company deals with petroleum products both for local markets and for export , and that they have a licence issued by the Ministry of Energy . PW1 said that during 1998 his Company entered into a 6 months agreement with Basimaki Bakabona for an export of 60,000 litres a week of petroleum products to designated customers in the then Democratic Republic of Congo. PW1 put in a copy of the said agreement dated 22nd August 1998 as an exhibit, and added that it was a term of the said agreement that his company was to transport 60,000 litres weekly to designated customers in DR Congo who were to pay them on delivery. According to PW1 his company was adequately prepared to comply with the terms of the contract. PW1 claimed that they bought the 1st 60,000 litres of Super Petrol for kshs. 624,733/- from National Oil Corporation and was issued with export invoice. PW1 claimed that the lorry reg No. TZP 8000/TZE 5740 they hired could carry only 58,000 litres, and that it was loaded with it thereafter they were issued with the necessary documents. PW1 indicated that that consignment according to the instructions of Basimaki Bakabona to be delivered to Paluku Sirimasi of Goma in DRC. PW1 claimed that after procuring all the necessary documents the loaded vehicle set off in a convoy to DR of Congo on 30th November 1998 but the vehicle and its contents was seized on 3rd December 1998 , vide, on the allegation that it was found with uncustomed goods. According to PW1 the vehicle and the contents were released to the driver on 9th December 1998 by a Court Order . PW1 said that they paid demurrage charges of kshs. 14,500/- for 7 days . PW1 claimed that despite the Court order the vehicle and its contents were once again detained by the customs official on the ground that an appeal was being lodged. PW1 claimed that thereafter the driver of the said vehicle was arrested and was taken to Vihiga Senior Resident Magistrate's Court where he was charged with others but on 1st February 1999 he was acquitted. PW1 claimed that after the acquittal the said vehicle and the contents were released to them but they discovered that between 9th December 1998 and 1st February 1999 28,000 litres of the petrol worth Kshs. 294,000/- had leaked and it was cost. He said that the plaintiff looked for another lorry to transport 30,000 litres of super petrol which was still remaining to the destination and they paid kshs. 134,482/- demurrage charges , and another \$ 80,000 to the former lorry for the loss of business for 3 months . PW1 further claimed that Basimaki Bokabona eventually cancelled the contract he had executed with the plaintiff on the ground that the plaintiff had failed to fulfil its terms. PW1 contended that as a result of the frustrations perpetrated by the defendants the plaintiff incurred substantial losses. He said the plaintiff lost business which it would have earned it \$ 828,000 over 6 months period. He added that the plaintiff bought fuel from N.O.C. with whom it had a contract relating to bond for export of fuel.

Suleman Nasoro PW2 said that he is a Tanzanian from Mwanza who in November 1998 was a driver of Scania Truck / trailer reg No. TZF 8000 / TZE 5740 and that he came to Kisumu Pipeline station to collect and transport super petrol which was to be exported to Kigoma in the Democratic Republic of Congo by the plaintiff. PW2 added that his vehicle had the capacity to carry 58,000 litres and that the plaintiff agreed to pay him \$11,000 for the transport . PW2 added that he was paid the money and he loaded the lorry with the fuel on 28th November 1998 and and thereafter he set off in a convoy but on 3rd December 1998 he was stopped by the Customs Officials who arrested him and brought back to Kisumu . PW2 claimed that the Kisumu Court released him to go and transport the fuel on 9th December 1998. PW2 said that he was waiting to join the next convoy the vehicle was seized again by customs officials and he was forced to return the vehicle to the pier but he was taken to Vihiga Law Court where he was charged with dumping fuel which was destined for export. PW2 claimed that he was tried but after 3 months he was acquitted by the court and that when they went to see the vehicle they found that 28,000 litres had leaked and was lost. PW2 said that thereafter the plaintiff hired another lorry to transport the fuel to DRC and that he was paid \$ 69,000 by the plaintiff for the 3 months in addition to the \$11,000 which was paid earlier on. PW2 said he had transported fuel earlier on from Kisumu to DRC and that he

knew the route. He added that he had all the necessary documents and that he was in a convoy when he was arrested. The witness confirmed that although earlier on the vehicle had seals it was not clear how 28,000 litres of petrol leaked when truck was at customs prior in Kisumu.

PW3 Etienne Basimaki Bakabona told the court that he lives in Bunya in the then Democratic Republic of Congo and he is a businessman dealing with the import and distribution of petroleum products in his country. He said that he gets his products from Kisumu and distributes it to his customers in his country. PW3 added that in August 1998 he entered into a contract with the plaintiff for supply of fuel to him in Congo . According to pw3 the plaintiff was to meet all the expenses of transportation of such fuel and that he wanted the first consignment of 60,000 litres of super petrol to be delivered to Paluku Silimasi at Gome who was his customer . PW3 claimed that the plaintiff did deliver that consignment on allegation that it had some difficulties with Kenya Revenue Authority . PW3 said that he concluded that the plaintiff was not able to fulfill the contract and he therefore cancelled it. PW3 claimed that in February 1999 he bought 30,000 litres of super petrol from the plaintiff and had it exported to his country. PW3 indicated that though he paid for the transport he recouped it from the plaintiff. PW3 denied that he had been dumping petroleum products meant for export in Kenya. He added that he is also known as Basimaki Bakabona.

Wilson Kiptoo Rop who was with National Oil Corporation testified as PW4 and said that he was based in Kisumu in September 1998 as Depot Supervisor and that his responsibilities included overseeing deliveries of petroleum products to the customers. PW4 claimed during that time the plaintiff company which used to buy fuel from them made an order for 60,000 litres of super petrol for export but when the truck was brought in it was discovered that it could carry only 58,000 litres . PW4 added that the price of the fuel was \$10,000 and that the NOC received the money and the customer executed a bond valued at kshs. 1,281,909/-. PW4 claimed that there were no leakages noticed in respect to the truck which collected the plaintiff's fuel. PW4 claimed that the vehicle was shortly later seized and that he saw a notice which claimed that the fuel was being dumped locally. PW4 claimed that they were asked to check whether the fuel was still in the truck but they found that the seals were still intact. PW4 stated that there was a case in Kisumu Law Courts where the driver was released but the vehicle did not leave as the driver was thereafter prosecuted at Vihiga Law Courts on the charge of dumping fuel. He said later on there was a request for transfer of the fuel to a different vehicle which was to transport 30,000 litres the remainder of the fuel the plaintiff had bought. The witness claimed that that purchase of fuel by the plaintiff was the third instance by them to buy fuel.

Richard K. Lubano (DW1) of Kenya Revenue Authority said that in 1998 he worked in Kisumu with Customs and Excise under investigations and that on 3rd December 1998 he received a call from the Principal Investigations Officer who instructed him to proceed to the Provincial Police Office Kisumu . DW1 said that at policestation he found a foreign registered vehicle and that he issued a seizure notice to the driver and proceed to seize the lorry reg. NO. TZF 8000 / TZE 5740 loaded with 58000 litres of premium petrol for export, worth kshs. 624,733/- free on board. DW1 claimed that on 9th December 1998 he received a minute to the effect that a court order had released the said vehicle was to join the next convoy which normally comprises about 40 vehicles under an escort of police and customs officers.

Richard Akinyi Osir testified as DW2 and said that in 1998 he was working with customs in Kisumu and that he was involved in petroleum products from Kenya pipeline for both home consumption and export. He stated that in this case the truck was released to set off for Busia in a convoy which convoy was escorted by police and customs officers. DW2 added that his duty was to organize transport for the escort team which consisted of one Inspector of Police , and 5 constables and one customs officer but on the following day he received information that one truck had been arrested on an ungazetted route but he did not know what happened to the matter later on. DW2 said that he did not know the police officers and customs officer who were on escort on the day the plaintiff's fuel was to be transported out of the country. DW2 admitted that the exporter of the said fuel is indicated in the papers as NOC which had bound itself to ensure that it was exported. He also confirmed that the seizure notice indicated that that lorry was carrying uncustomed goods.

The first issue that ought to be decided is whether the defendants are liable to the plaintiff for the losses it

incurred. The witnesses who testified before agreed that the plaintiffs had bought 58,000 litres of super petrol from NOC and had obtained all documents for the export of it. It was also common ground that when the truck reg. No. TZF 8000/ TZE 5740 carrying the said fuel set off from Kisumu for Busia the exit point it was in a convoy of many other trucks and tankers and that it was under an escort of policemen and customs officers. However when the vehicle was seized the reason given in the seizure Notice of 3rd December 1998 was that it had uncustomed goods. The officers who carried out the arrest and the seizure could not have failed to have seen that the said fuel was to be exported to Paluku Surimasi in Goma of DR Congo as shown on the papers with the driver and that there was an executed bond made by NOC . In my view there were documents which clearly indicated that the 58,000 litres of premium petrol ferried by the said lorry was for export and the claim that it was not customed was not genuine. There was another reason for seizure which was that the vehicle was found in ungazetted route but this appears to have not been convincing. The driver of the lorry told the court that that was not his first time in the area and that he knew the route well. There was also a team of officers who escorted the convoy of the trucks including the one in question. The defendants' agents' claim that the said truck was found on ungazetted route was not adequately explained .

There is also evidence that on 9th December 1998 the Chief Magistrate's court released the said vehicle and directed it to resume the trip but it was not released by the defendants on an allegation that they were appealing against the order, but there was no appeal, instead the driver was taken to Vihiga SRM Court where he was charged with using ungazetted route and attempting to discharge goods meant for export. Eventually the driver and the co-accused persons were acquitted after 3 months. The defendants had failed to establish the alleged claims of the use of ungazetted route by the driver of the truck . When the lorry was eventually released to the plaintiff it was discovered that 28,000 litres out of 58,000 litres had leaked out.

Looking the evidence on record I am satisfied that the agents of the defendants recklessly and maliciously deliberately caused all the losses the plaintiff incurred in respect to this case. The defendants are therefore jointly and severally and vicariously liable to the plaintiff in damages.

I now turn to examine the losses which the plaintiff suffered . In the two periods between 3rd December and 9th December 1998 and 9th December 1995 and 1st February 1999 the plaintiff was charged demurrage charges amounting to kshs. 181,607/- which it paid. The amount arose directly from the seizure of the lorry and its contents. The plaintiff is entitled to be paid this amount.

The second claim is for a loss of 28,000 litres of super petrol due to leakage when the truck in which it was loaded was detained at the 1st defendant's pier in Kisumu between 9th December and 1st February 1999. The value of the petrol was stated to be Kshs. 294,000/- . I award this amount.

The plaintiff stated that the loss of profit from the 28,000 litres of the petrol was \$16,100. That sum is not challenged. Accordingly I award it.

The next claim was the refund of \$ 80,000 paid to driver of o the truck reg. No. TZF 8000 / TZE 5740 as loss of user of the vehicle. I agree that the plaintiff ought to compensate for this loss. I do not agree that the sum of \$11,000 paid to the second truck which successfully transported 30,000 litres ought to be paid to the plaintiff.

The last claim is for loss of business of export of petroleum products to the Democratic Republic of Congo for 6 months in terms of the contract of 28th August 1998 executed by the plaintiff and Etienne Basimaki Bakabona. The contract was for 6 months which was 24 weeks. In each week the plaintiff was entitled to export 60,000 litres of petroleum products which could have been in form of paraffin or super petrol or regular petrol. Each of these three types of the petroleum products was of different value. Bearing that factor in mind and taking into consideration imponderables and vicitudes and other fluctuations during the same period I would accept a multiplier of 20 instead of 24 weeks. The profit which the plaintiff had anticipated was 0.75 cents per litre . There is an element of costs of the transport and other expenses which when considered should bring in my view the profit to 0/50 cents a litre. The loss incurred by the plaintiff is therefore $60,000 \times 20 \times 0.55 = \$600,000$.

There will therefore be judgment for the plaintiff against the defendants jointly and severally as follows;

(i) Demurrage charges	Kshs. 181,607/-
(ii) Loss of 28,000 litres of S. Petrol	Kshs. 294,000/-
(iii) Loss of profit in 28,000 litres	\$ 16,100
(iv) Hire charges of truck reg TZF8000 /TZE5740	\$ 80,000
(vi) Damages for loss of business	\$ 600,000
(vii) Costs and interest	

The Kenya Shillings equivalent of damages in the dollars is to be worked out before the decree is perfected.

Dated and delivered this 31st October 2003.

B.K. Tanui

JUDGE