



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI MILIMANI COMMERCIAL COURTS

CIVIL CASE NO. 2476 OF 1989

NAKA INDUSTRIES LIMITEDPLAINTIFF

VERSUS

COMMISSIONER OF CUSTOMS & EXCISE.....DEFENDANT

JUDGEMENT

On or about November 1985 the Plaintiff imported into Kenya a vitalingh-efficiency coating machine with accessories (hereinafter referred to as “the goods”). The goods were not cleared and were transferred to the customs warehouse at Kilindini. By Gazette Notice No. 4955 of November 1987, the goods were advertised to be sold by public auction at the customs warehouse, Kilindini on Tuesday 1st December 1987. The goods appeared in the said Gazette Notice as Lot No. 1070.

But in contravention of the provisions of the Customs and Excise Act and without lawful authority, the Defendant sold the goods by private treaty. The Plaintiff filed this suit against the Defendant for Shs.13,799,258/- the equivalent of Kenya Shillings of Deutsche Marks 2,159,210 being the costs of the goods and account of how much the oods were sold for and how the proceeds were utilized and if any money is found to be due to the Plaintiff, an order that the amount so found to be due to be paid to the Plaintiff. The Plaintiff also sought a declaration that the sale of the goods by private treaty was unlawful. He also sought Shs.128,796/- being the amount he had paid for insurance, Damages, costs of the suit plus interest.

Briefly, the facts which are admitted were that the Plaintiff imported some machinery as referred above into the country. This machine was not entered for the purposes of Customs and Excise Act. The Act provides the procedure of entering the goods which have entered the country. Section 37 of the Act (Cap 472); when this is not done, the Commissioner of Customs can transfer the goods to a customs warehouse. This is what was done if the goods are not removed from the warehouse within a certain period they can be advertised and sold by public auction after the Commissioner of Customs giving requisite notice. In this case, it is not in dispute that the goods were imported on 16.11.1985. But they were not entered by the Plaintiff and were therefore, transferred to the Customs warehouse in Kilindini. It is also not in dispute that the sale of the said goods was advertised in the Kenya Gazette Notice No. 4955 dated 23.10.1997 and the sale was to be by public auction.

The main question to be determined by the Court relates to this sale. Mr. Ojiambo counsel for the Plaintiff submitted that it is common ground that there was no sale by public auction. The sale was by private treaty by the Customs and Excise Department. It is the Plaintiff’s case that the Commissioner of Customs would not have sold the said goods by private treaty. He had to do so by public auction and had to apply the said proceeds to pay for any duties or charges due to the Commissioner and to account for the balance

to the owner of the goods. Counsel for the Plaintiff concedes that the Plaintiff did not comply with the law in respect of entry of goods that are imported into the country. The law then (but now repealed) required that the goods imported into the country must be entered for custom purposes within a specified period (Section 27 of the Act then but now repealed). For that failure on the part of the Plaintiff, the goods were removed to the customs warehouse and if the same were not lawfully removed within 60 days they became subject to be sold by public auction under Section 34 of the Act. The Act also provides that where there is such a sale by public auction, the proceeds shall be applied in a given order: -

- (1) Duties payable if any
- (2) Expenses of removal
- (3) The port charges
- (4) Freight and other charges

Section 34(4) deals with what happens with the balance of the sale proceeds. Counsel for the Plaintiff in conclusion sought a declaration that the sale of the Plaintiff's goods by private treaty was unlawful and sought judgement for Shs.13,799,258/- which is the equivalent of Deutsche Mark 2,159,210 plus Shs.128,796/- the insurance premium and costs and interest. Counsel for the Defendant concedes that the goods of the Plaintiff were sold by private treaty at Shs.2,000,000/- under Section 34 of the Act. She also admits that Section 34 of the Act does not provide for sale by private treaty but she submitted that the Plaintiff had failed to enter the goods for customs purposes and the goods were never collected for well over a period of 3 years. An attempt was made to sell the same by public auction but there was no bidder. The Defendant had no option but look for other method to get rid of the said goods from the port. The Act is silent on what should be done in the event no bidder is found at the public auction. This is the law that was but which has since been repealed. The Plaintiff asks for the market value of the goods which is stated at Shs.13,799,258/-. But at the same time, he admits that the said goods were subject to public auction. It is common knowledge that when property or goods are subject to public auction, they do not fetch market value. That is what we call forced value and it all depends on the highest bidder and sometimes guided by reserve price.

In the present case, since the Plaintiff had failed to enter the goods for customs purposes, and the goods were removed to customs warehouse and they were never collected within the prescribed period, and for about 3 years they were at the warehouse and became subject to public auction, the Plaintiff is not entitled to their market value. The Plaintiff is also not entitled to insurance premium because of his failure to comply with the law and nor is he entitled to damages. I agree with counsel for the Plaintiff that the Act did not provide for sale by private treaty but as counsel for the Defendant puts it after the goods had remained uncollected for over 3 years, that was the best option open to the Defendant to get rid of the said uncollected goods, sale by public auction having failed and the Act being silent on the next course to take.

I am therefore, not inclined to declare the sale by private treaty unlawful as the Act does not expressly say so as what was done was out of necessity, and make a finding that the Plaintiff was entitled to the sum fetched at the sale which is Shs.2,000,000/-. Subject to the amount applied for;

- (1) Duties payable if any
- (2) Expenses of removal of the goods to the Customs warehouse and sale
- (3) The port charges
- (4) The rental and other charges
- (5) Freight and other charges lawfully levied;

I enter Judgement for the Plaintiff against the Defendant for Shs.2,000,000/- with costs and interest

subject to the above deductions.

DATED and DELIVERED at Nairobi this 18th day of March 2002.

J.L.A. OSIEMO

JUDGE