



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIV CASE 422 OF 1998

THIKA WAX WORK LIMITED PLAINTIFF

- Versus -

NOVA CHEMICALS (NCL) LIMITED DEFENDANT

J U D G E M E N T

The Plaintiff Company Thika Wax Work Limited has sued the Defendant Nova Chemicals (NCL) Limited, the Defendant in this case. It is seeking Ksh. 7,076,131/55 on grounds that the Defendant did breach an agreement dated 13th February 1997 entered into by the Parties for the sale and supply of caustic soda to the Plaintiff. The amount claimed is made up of deposit for goods, interest thereon as at 19.8.98, Transport charges and interest thereon and loss of profit in the goods. The Defendant Company while denying the claim and seeking the Dismissal of Notice filed, Amended Statement of Defence and Counter-claim in which it is claiming by way of counter-claim Ksh. 3,453,875/= in respect of value of 880 bags of caustic soda lost due to the delay by the Plaintiff to collect the goods, Breakage voucher issued by the Customs Department for 1,567 bags and cost of repairs alleged resulting from damage to the go-down floors and roof.

P.W.1 KANTILAL NATHALAL CHANDARIA is a director of the Plaintiff Company. In his evidence he stated that he knew the Defendant Company as the two companies had had business dealings before. In the year 1997, the Defendant offered to sell 199500 kilograms of caustic soda. The same goods were at that time in Mombasa at the Port. The Plaintiff agreed to buy the same and sale agreement was signed by the parties. The price agreed was Ksh. 22.50 per kilo at Mombasa port. Under the agreement, the Plaintiff was to pay Ksh. 2,500,000/= as down payment. The balance was to be paid once the goods were received by the Plaintiff i.e. when goods were legally transferred i.e. actual delivery of the goods into the Plaintiff bonded warehouse. There was to be a transfer of the goods from Defendant's warehouse to the Plaintiff's bonded warehouse in Nairobi. The Defendant was to give Plaintiff commercial invoice, bill of lading, certificate of analysis and further shipping and customs duty were to be supplied to Plaintiff by the Defendant. He produced a letter dated 13.2.97 which is a letter of contract as Exhibit 1(a), invoice as Exhibit 1(b), Bill of lading as Exhibit 1(c), Certificate of analysis as Exhibit 1(d) and import deduction fees as Exhibit 1(e), Plaintiff signed the letter of contract and gave the Defendant cheque No. 623693 of 13.2.97 for Ksh. 2,500,000/=. The cheque was paid on 17.2.97 copy of the cheque was forwarded by this witness as Exhibit 2. The Plaintiff then contacted a transporter to transfer the goods from Mombasa to Nairobi at Ksh. 1,200/= per ton as according to the agreement the Plaintiff was to transport the goods from Mombasa to Nairobi. However, the transporter was not able to collect the same goods, as there were no documents. He produced correspondence exchanged between Plaintiff and the transporters as Exhibits 3(a), 3(b) and 3(c). The Plaintiff signed transfer customs papers and returned the same to the Defendant. The documents were taken to Plaintiff by a messenger. He (witness) signed certificate of acceptance at

pages 7(a) and 7(b) of the bundle of documents annexed by the Plaintiff. He also saw warehousing documents Nos. 7 and pages 7(c) and 7(d) in the bundle. The purpose of those documents were for changing the goods from one bond to the other bond. The Plaintiffs were however not authorised to get the goods from their bonded warehouse before the approval. These were the instructions from Shabbir, which instructions were in a complimentary note produced as Exhibit 4(a). Transfer of ownership of warehouse goods is produced as Exhibit 4(b) and second transfer of ownership of warehouse goods is Exhibit 4(c). He further produced warehousing entry as Exhibit 4(d) and copy of it as Exhibit 4(e).

After he signed the documents and returned them back to Rajab, he never got back any document confirming the transfer at all and so his transporters could not transport the goods, as transfer had not been confirmed. The same goods had problem at Mombasa port and that was that the Defendant had not paid demurrage charges. Plaintiff was not aware of these facts when the agreement was entered into. Later the rent charges for customs warehouse was waived by the Ministry. That meant the Defendant could clear the goods, later again there was a further waiver of the rent by 33%, but the Defendant still did not put the Plaintiff into possession. As on 4.7.1997 the Plaintiff had not got the goods and the Plaintiff wrote to the Defendant seeking a refund of the deposit paid. He produced a letter from the Ministry of Finance on the same matter dated 23rd May 1997 as Exhibit 5(a) and letter from Ports Authority dated 24.6.97 as Exhibit 5(b) and letter dated 4.7.97 as Exhibit 5(c). Thereafter goods were available but this was after the expiration of the contract between Plaintiff and Transporter so that Plaintiff had to get another transporters - Lento Agencies and Road Sea Link Limited to transport the same caustic soda from Mombasa to Nairobi. They did that on 23.7.1997. The consignment note was in the name of Defendant. Bond 153 is owned by Defendant 36 pallets were consigned by the consignment note dated 23.7.97 (Exhibit 6(a). Plaintiff paid and invoices were sent to Plaintiff. Second invoice was for Ksh. 114,004/80 and there was another consignment note for 34 pallets. He produced several exhibits namely exhibits 6(b), 7(a), 7(b), 7(c), 8(a), 8(b), 8(c), 8(d), 8(e), 8(f), 9(a), 9(b) all on consignment notes and invoices of various pallets transported from Mombasa to Nairobi. The goods were transported to Plaintiff warehouse in Nairobi but as the Plaintiff had no transfer of the ownership the goods in their name, the Plaintiff sent the trucks back to Defendant's warehouse at Athi River. The Plaintiff could not accept the goods as it was against customs regulations. Plaintiff then asked for transfer of ownership but did not receive the same at that time. On 11th September 1997, Defendant wrote to the Plaintiff asking the Plaintiff to pick up the goods from their bonded warehouse within seven days. Plaintiff in turn sent a fax to Defendant stating that the Plaintiff needed transfer of goods. Plaintiff wrote a letter to the Defendant on the same. On 1st September 1997, Plaintiff's Director met Mr. Musau for the Defendant. Musau claimed to have known nothing at all about the transaction. The Plaintiff never received the documents of transfer of goods, letter of 2nd September 1997 was sent vide registered postage. In the absence of transfer certificate the Plaintiff maintained it could comply with the letter requiring the Plaintiff to collect the goods. Plaintiff sent to the Defendant another fax on 5th September 1997 but there was no reply and hence the Plaintiff contacted its advocates to demand the goods on their behalf. He produced letter dated 1.9.97 as Exhibit 10(a), Fax reply as Exhibit 10(b), letter dated 2nd September as Exhibit 10(c) certificate of postage as Exhibit 10(d), and Fax message as Exhibit 10(e). Advocate demanded the goods within seven days but there was no response in that letter of demand as Exhibit 11(a). Second letter was sent and that is Exhibit 11(b). The Defendant then through their advocate denied liability in Exhibit 12. Plaintiff paid transporters Road Sea Link through Receipts Exhibit 13(a) – 13(g). The money that was paid in respect of the transaction was obtained from Kenya Commercial Bank on a loan. He produced the cheque to Kenya Commercial Bank Exhibit 14(a), Debenture 14(b), Certificate of Registration 14(c), another cheque was also created Exhibit 14(d) and another Debenture Exhibit 14(e), and certificate 14(f) and there were also guarantees Exhibit 14(g), 14(h), 14(I) and 14(j). Defendants were being paid through this account and he related all payments made to the Defendants to this account which was a loan account with Kenya Commercial Bank and produced Bank Statement as Exhibit 15. The Plaintiff got further overdraft facility to run the same account. The Bank was reviewing interest rate which was fluctuating from time to time. All invoices of interest rates were produced as Exhibits 16(a) – 16(s) and he produced tabulation of interest as Exhibit 17. He then produced as Exhibit 18(a) an invoice dated 29.8.97 from Nova Chemicals to Osho Chemical Industries which showed caustic soda sold to Osho Chemical maintained that the product was the same as what was ordered from Defendant and thus the price were the same. The cost according to that invoice Exhibit 18(a) was Ksh. 38/= per kilo and the witness maintained that if he had obtained the goods for the Defendant, he would have sold the same at

the same price and the net profit would have been Ksh. 1,750,000/=. Plaintiff lost this profit. The transport charges Ksh. 239,400/= as offered to what was pleaded in the Plaint of Ksh. 566,518/20. He is seeking Ksh. 1,750,000/= as loss of profit and not Ksh. 2,354,100/= and so the total claim is seeking is Ksh. 6,472,031/55 plus costs and interest. He ended his evidence in chief by saying that as they never had the documents of the transfer for the goods, customs people would not allow them to handle the goods without proper procedure and maintaining that Defendant did not suffer any losses and Plaintiff was not informed that any caustic soda was lost, witness was not informed of any breakages and any damages to the Defendant's go-down.

In cross-examination, he admitted that the entire transaction is based on the letter of contract and Plaintiff accepted the terms of the same letter of contract. According to the same contract Plaintiff was to buy 199500 Kgs caustic soda valued at Ksh. 4,488,750/= at Mombasa port and he paid Ksh. 2,500,000/= as down payment. The balance was to be paid once the goods reached Plaintiff's warehouse. He never paid balance. While consignment came to Nairobi Plaintiff had according to Exhibit 1 been given commercial invoice, Bill of lading and certificate of analysis at the time the contract was signed, but not all documents were given to it. Shown Exhibit 4(b) transfer of ownership warehouse goods dated 24.2.97 he admitted it was signed by both parties. The certificate of acceptance was also signed by the witness.

The certificate says, "I am the owner of all the goods". He was the one to transport the goods and there is no provision of financing the transport. He admitted that the Plaintiff never agreed with the Defendant that the Plaintiff would take loan from the Bank for the financing of the transaction and there is no where in the contract that made the Defendant responsible for the Plaintiff's respectively for its financial arrangement. From Exhibit 4(a) – 4(j), charge was established on 4.1.1985 whereas this contract was entered into on 13.2.1997. The Plaintiff was using the Bank facilities continuously as it was for its own business but there was no agreement in the contract as to where the Plaintiff would get the money to finance this transaction and the Defendant was not a party to Plaintiff's contract with the Bank. Exhibit 16 is dated 29.3.1995 and is a letter offering Bank facilities to the Plaintiff whereas the down payment was made on 13.2.97. That facility offered vide Exhibit 16 was for Plaintiff's general business as it was established after down payment had been made. He admitted that the money was bound on old facilities and was not part of any contract between the parties to this transaction. Plaintiff used the money for the general running of its business.

Shown Exhibit 16(a) – 16(s) he admitted that Defendant was not a party to the negotiations for reviewing of interest rate which rate review was in respect of the overdraft generally. Shown Exhibit 18, he admitted that the Plaintiff was the only customer. Exhibit 18 shows that Nova Chemicals had sold Plaintiff's goods to third person. He knows Defendant deals in Chemicals but he does not know of any other transaction between Defendant and others and he could not tell whether the goods sold to Osho Chemical Industries Limited was Plaintiff's caustic soda or not and such prices could be negotiated. Shown Exhibit 19, he agreed that that showed the parties had agreed that they were buying Plaintiff's goods at Ksh. 38 per kilo gram, but there is no evidence before the court that the Plaintiff had agreed to sell at Ksh. 38/= per kilo gram. Shown Exhibit 20, 20(a) and 20(b), he admitted that they related to companies between Plaintiff and Kenya Revenue Authority. They never made a finding against Defendant and they did not blame the Defendant.

In Re-examination, when shown Exhibit 1(a), he agreed that all the documents were given to Plaintiff except Customs documents for transfer of the goods. Plaintiff was only given photocopies but Defendant remained with the originals. Exhibit 4(a) was signed to be given to the Customs people. The acceptance was in respect of goods from Nova Chemicals bonded warehouse to Thika bonded warehouse. It did not mean that the goods were given to the Plaintiff. After the documents were signed the copies were taken by the Defendants and they were to take them to the Revenue Authorities for execution of certificate. When certificate came plaintiff signed it and returned it to Shabbir of the Defendant Company. A look at the bottom of Exhibit 4(b) shows it was not executed by customs for if it had been executed, they would have put the entry made and there would have been customs officer's signature. Without such procedure being accomplished, Plaintiff could not get such goods into its bond. There was no signature of customs profile on Exhibit 4(b). If Exhibit 4(a) and 4(b) have been completed to the end, the goods would not have been in the Defendant's bonded warehouse. Because they were not completed, it would have been

unlawful for the Plaintiff to keep the goods in Plaintiff's bonded warehouse and defendant would not have accepted that. Plaintiff did intimate to the Defendant that they would pay interest and in Exhibit 5(c) the Plaintiff asked for money to be paid back with interest and that was because the Plaintiff had taken money from the Bank. The same overdraft facility was asked for cash in 1985 but later the Plaintiff sought same facilities. He produced Exhibit 18 to show at what price the product is offered to the people for sale. If Plaintiff had received the goods, he would have sold it at Ksh. 38 per kilogram. If goods had been transferred to Plaintiff, the customs profile would not have found them into bonded warehouse of the Defendant.

The Defendant also called one witness, RICHARD KIMITHI who is now with Pinkertus Kenya limited, but was at the relevant time the Finance Manager with the Defendant Company. At the relevant time he was directly involved in the matter. Defendant entered into a contract with Plaintiff on 13.2.1997 and he was a signatory to the same contract. He showed the court his signature and produced it as Exhibit D1. Goods were to be delivered to the Plaintiff's bonded warehouse. Copies of the invoices were given to the Plaintiff. Further documents were to be given to the Plaintiff as and when required. Agreed value was Ksh. 4,488,750 based on the agreed price.

Plaintiff did not pay whole of the amount. It paid Ksh. 2,500,000/= as down payment. Documents were given to the Plaintiff as stated into contract document. Later Defendant signed and gave transfer of ownership and that is evidenced in Exhibit 4(a). The Plaintiff signed certificate of acceptance and by doing so, he was assuming the ownership of the goods and was to pay rents and charges due when called upon. Transport was Plaintiff's responsibility. Plaintiff did receive the goods at its warehouse in Thika and transferred the same to Defendant's warehouse at Athi River. The Plaintiff's warehouse is No. 158 but the Plaintiff transferred the goods to Defendant's warehouse which was No. 153. Transfer was signed on 24.2.97 as the cheque paid on the contract date for Ksh. 2.5 million had to be banked. He produced as Exhibit D2, warehousing entry, some of the goods were destroyed at the Port and when the Plaintiff was transferring the goods, 649 bags were destroyed at the hands of the Plaintiff. As a result of this mishandling of goods by the Plaintiff, Defendant applied for customs storage and breakage examination voucher. After examination a further 1,556 bags were found to be corroded and non-useful. He produced Exhibit D3 to prove the same. The authorities certified the same losses. As some bags had been turn on its way when being transferred, some bags had to be rebagged.

During rebagging, part of the materials split on the floor. Rebagging was done by the Defendant. The floor was destroyed and had to be repaired. Roof was also destroyed and had to be repaired. Defendant then gave the Plaintiff notice to collect the goods Exhibit D4. The Plaintiff did not collect the same goods. He produced Exhibit D5(a) quotation for repair of the floor.

The Defendant paid Ksh. 296,775 to June Steel Fabricators for the same repairs – Exhibit D6 was produced to support the same payment, contractors repairing the floor was paid Ksh. 415,000 and which Exhibit D7 was the evidence for that repayment. This is what is being counter-claimed. Goods that were undamaged were offered for sale and sold to other people by the Defendant. On 1.9.97, Defendant received demand from Plaintiff's advocate on the losses the Plaintiff had incurred – Exhibit D8. Defendant's Lawyers replied Exhibit D9, a letter of 13.10.97. He produced Exhibit D10 an invoice for payment made to June Steel Fabricators. Shown the contract, he stated that it was not agreed that the Plaintiff would take a loan or any kind of financial facility to pay the Defendant and they were not made aware of that aspect. Defendant was not a party to a contract between the Plaintiff and its bank. Plaintiff never authorised Defendant to take a loan for purposes of this transaction. The Plaintiff never told them the money that was being paid to Defendant was proceeds of the loan. No interest payment was agreed upon at all. Defendant is a chemical business and they do sell goods to other people but prices are subject to negotiations and caustic soda prices are volatile as they keep on changing. Shown Exhibit 18(a) this amount was that prices quoted are not constant as prices are individually negotiated and agreed between parties. The Defendant was not aware of the Plaintiff's complaints but after the Kenya Revenue Authority investigated the same complaints nothing was revealed against the Defendant.

On cross-examination he said Defendants cleared the goods in July 1997. Shown Exhibit 4(a) (b) and (c) he agreed that transaction was not completed in two weeks and that it was signing of the transfer and

payment that was completed in two months and not the whole transaction. The Plaintiff had taken the goods in paper but goods developed problems in Mombasa, which delayed the completion of the transaction. It was Defendant's duty to pay for rent and demurrage but not transportation. He then gave evidence of the matters that took place before the goods arrived at Mombasa and the delay in the arrival of the goods. Shown Exhibit 4(a) he stated that Shabbir who was then his immediate boss told the Plaintiff to sign the certificate and return it for the Defendant to proceed. The proceeding was to lodge the documents with the customs and he admitted they did not have a copy of the copies executed by the Customs people. On its being put to him that customs people never executed the transfer of ownership, his answer was that he just remember the Defendant lodged the documents with customs but he had no evidence of their having been returned and he does not know whether they were executed by conditions or not. He also admitted that the Plaintiff could not legally take precaution of the goods without approval of customs department. He did not have a copy of insurance bond that the parties were to execute. Shown Exhibit D2, he agreed that the inspector is the Defendant, and stated that legally, none can take any goods to any warehouse without the document Exhibit D2, and as at that time the customs had not endorsed the transfer it was proper the goods were released to Defendants bonded warehouse and the Plaintiff could not take the goods to its bonded warehouse without approval of the customs department. He stated that the goods were not received into the bonded warehouse of the Defendant. They were received in the General warehouse.

He admitted that it was the Defendant that later put the goods into the bonded warehouse thereby removing them from the General warehouse where Plaintiff had put them. Customs officers visited the warehouse and supervised the goods but found the Defendant had committed no offence.

Defendant did not demand the balance of the purchase price and only told the Plaintiff that if they did not collect the goods the Defendant would sell the same to recover their losses, which it did. Defendant did not write to Plaintiff to tell them same goods were destroyed. There is no document showing the goods were destroyed, and customs document showing that goods were destroyed is not before court. He cannot remember the customs officer who destroyed the same goods and he does not have the number of bags that were rebagged. He cannot remember when the Defendant did rebagging. In the letter Exhibit D4 the Defendant could have made a mistake when it used the word "intact" in describing the goods at that time.

Further, he agreed that it may not have been prudent to destroy the bags on the floor. He had no tender for quotation in Exhibit D 5(a), as the price was negotiated. In the document of repairs it is not stated that roof was repaired nor is it stated that warehouse was repaired. What is stated is that factory was repaired. He then accepted that the payment was made but so many other aspects such as PIN number, VAT deductions etc were missing from the documents exhibited. Goods were sold but he does not know when they were sold and he did not know that notice of 60 days was required and advertisement was required before such act take place. He agreed that sale of caustic soda was in the ordinary course of business and storage of caustic soda in bond No. 153 was in the ordinary course of business. The Plaintiffs agents left the caustic soda in the General warehouse which is not a bonded place but they are attached to bonded warehouse. Defendant's workers received the caustic soda to the bonded warehouse. He could not remember how much they sold the caustic soda. Prices were different from time to time. A loan is one of the methods of financing the business.

On re-examination he said Plaintiff eventually got hold of the goods at Mombasa and took charge of transport. He had passed the relevant documents to Plaintiff to sign but after they were signed by Plaintiff, Defendant forwarded them to customs Department but he does not know what happened thereafter. Exhibit 4(a), 4(b) and 4(c) are in the names of both parties. He agreed that the Plaintiff put the goods in the General warehouse and moving the goods to bonded warehouse was done by the Defendant's employees but at that time they were already destroyed.

Factory refer to the same Godown, and the Defendant had not contracted anybody to do any other work apart from the damage caused by the relevant goods. He raised vouchers Exhibit D7 and Exhibit D6 because the work was done but he did not check whether VAT was paid or not. He would not know whether the goods that were being sold as per Exhibit 18 and 18(a) were the same goods as are the same goods here and lastly that Defendant had not agreed with the Plaintiff that Plaintiff would take overdraft

to finance the loan.

The above were the facts of this case as given in evidence. It is not in dispute that the parties to this suit entered into a contract which was reduced into nothing Exhibit 1(a) that content was in the form of a letter to the Plaintiff dated 13th February 1997 which was signed by four persons – two representing the Defendant and two representing the Plaintiff. It stated as follows:

“13th February 1997

The Managing Director

Thika Wax Works Ltd,

P.O. Box 30185,

NAIROBI.

ATTENTION: MR. J.N. CHANDARIA

Dear Sir,

REF: SALE OF CAUSTIC SODA PRILLS 190 PALLETS OF 21 BAGS EACH OF 50 KG (199500 KGS) We agree to sell the aforesaid consignment to you on the terms and conditions as follows:-

1. The sale price is Kshs. 22.50 Ex-Mombasa (Cleared Bond)
2. A down payment of Kshs. 2,500,000 will be made by you while the balance will be paid immediately at transfer of goods to your Bond No. 158 (Valid)
3. Transport from Mombasa – Nairobi will be organised by you.
4. Copies of Commercial Invoice/Bill of lading/Certificate of analysis are enclosed for your needful. However, any future Shipping/Customs documents will also be provided to you which you may require in this context.

FOR NOVA CHEMICALS (NCL) LTD

Signed Signed

Authorised Signatory Authorised Signatory

(ACCEPTED)

FOR THIKA WAX WORKS LTD

Signed Signed

Authorised Signatory Authorised Signatory

Signatures”.

As I have stated hereinabove the parties do accept that they entered into this agreement and none of them has raised any questions as to the validity of this agreement. It is also clear that this agreement specifically stated that acceptance copies of Commercial Invoices, Bill of lading, and Certificate of analysis were enclosed, the Defendant did undertake to provide any future Shipping/Customs documents which may be required for the transaction.

That the Plaintiff paid a down payment of Kshs. 2,500,000/= is not disputed.

It is also not in dispute that the Plaintiff did provide transport for the subject goods from Mombasa to Nairobi and the Defendant is not in any way blaming the Plaintiff for the delay in releasing the same goods from the port as it appears from the evidence that the same delay was caused by matters that were not of the Plaintiff's making but were of the Defendant's making.

The Defendant says that it did effectively and legally transfer to the Plaintiff the same goods when it forwarded to the Plaintiff a document Exhibit 4(b) which was forwarded to the Plaintiff vide exhibit 4(a). Exhibit 4(b) is Customs and Excise Form C25 and is headed Transfer of Ownership of Warehouse Goods. The Form stated in part as follows:

“Please note that I have this day transferred the undermentioned goods which are deposited in Bonded Warehouse No.153 ATHI RIVER to THIKA WAX WORKS LIMITED of P.O. Box 30185, NAIROBI (BONDED WAREHOUSE NO. 158).”

And is signed by the Defendant's authorised signatory. The same goods are then described in the same form. The Form has certificate of acceptance and that part states in part as follows:

“CERTIFICATE OF ACCEPTANCE I THIKA WAX WORKS LIMITED of P.O. Box 30185, NAIROBI hereby certify that as from this date I am the owner of the above mentioned goods and I undertake to pay when called upon to do so, all duties rents and charges due and accruing thereon”.

That part was duly signed by the Plaintiff's Director. It was signed on 24.2.1997 which was the date the form was prepared. That form was forwarded to the Plaintiff vide a note on the Defendant's letter headed paper.

The note stated:

“Mr. J. Chandaria – Thika Wax Works

I received these documents immediately after I talked to you.

Kindly sign and return so as to proceed.

Kind regards,

SHABBIR

24.02.97.” The Plaintiff says this document did not transfer the legal possession and ownership to it as it was yet to be approved by customs Department and that without that approval, the same document is of no use and so the Plaintiff maintains that as its director signed the same document and returned it to Defendant who was to have the same approved by customs and return it to the Plaintiff and as the same Defendant never returned the approved transfer of ownership of warehouse goods, it could not in law collect the same goods and so its contents in that the goods it contracted for were not legally and validly delivered to it, and hence the claim.

I have considered the Defendant's contention and the Plaintiff's contention on whether or not the ownership of the goods contracted for were validly and legally transferred to the Plaintiff. First even a casual look at Exhibit 4(a), a note addressed to Plaintiff by Shabbir for Defendant show clearly that the Defendant itself wanted the Plaintiff to sign the Exhibit 4(b) – Transfer of Ownership of Warehouse Goods Form not as an end in itself but as a step required towards proceeding with the transaction. Plaintiff was (according to that note Exhibit 4(a)) to sign the same form and return it to Defendant “so as to proceed.” Surely if the signing of the document was the end of the transaction and if it did all on its own confirm legal ownership on to the Plaintiff then what was the need to sign it and return it to Defendant so as to proceed? “To proceed with what” if not with further transaction.

Secondly, Exhibit 4(b) Form C25 I have referred to is a Customs Department Form. At the bottom of it there are certain entries and these are that the transaction is required to be noted in warehouse Registration No. and at a certain page to be noted and the Customs Officer is to sign it and enter the date for such an entry. That was not done here and I feel that was the approval required to be obtained before the Plaintiff could take over goods into its bonded warehouse. Without the same approval the Plaintiff could not take the ownership and legal possession of the goods. Thirdly, the Defence witness, Mr. Richard Kimithi when asked in cross-examination by the Plaintiff's counsel whether the Plaintiff could legally take possession of the goods without approval of Customs Department stated as follows:

"It was not possible"

Thus even going by the Defendant's own evidence the Plaintiff could not be said to have taken the legal ownership of the subject goods when the Customs Department had not approved the transfer certificate. The same witness say he remembered lodging the same Form C25 Exhibit 4(b) with customs but he said he had no evidence of their being returned to the Defendant and he did not know whether conditions executed the same Exhibit 4(b) or not. Well, what I have before me in evidence is not executed. It is the Defendant that relies on it to demonstrate that the transfer was proper and valid. The same Defendant has a duty to prove that the same transfer was valid and was approved and that the parties could act on it as a valid document transferring the ownership of the goods to the Plaintiff, it has failed to do so and I am duty bound to find that the goods were not transferred to the Plaintiff and the Plaintiff never assumed the legal ownership of the same goods. The inevitable conclusion is that the Defendant was in breach of contract and is liable for the same breach as the Defendant failed to provide the customs document that was required in the context of the entire contract i.e. to enable a valid transfer of ownership into the name of the Defendant to be effected and this is in breach of clause 4 of the same agreement. I now wish to consider the effect of the same breach of contract. Under paragraph 9 of the Plaint, the Plaintiff is claiming a total of Ksh. 7,076,131/55 made up as follows:

- (a) Deposit of goods Ksh. 2,500,000/=
- (b) Interest thereon as at 19.8.98 Ksh. 1,436,518/20
- (c) Transport charges Ksh. 566,857/20
- (d) Interest thereon as at 19.8.98 Ksh. 218,616/15

and

- (e) Lost profits on the goods Ksh. 2,354,100/=

During the hearing, the Plaintiff's witness said transport was actually Ksh. 239,400/= and not Ksh. 566,518/20, and he also said that the net profit it would have made is Ksh. 1,750,000 and that the Ksh. 2,143,032 was the amount he would have got before bank charges and other charges.

I will consider each of these claims separately. First is the amount of the down payment that was Ksh. 2,500,000/=. I do think it goes without saying that as the Defendant was in breach of the contract, this amount is refundable as it was paid for a deal that never was. I do allow it. Equally, the transport charges is an element of expenditure that could not have been entered into if the goods were not to be sold to the Plaintiff. The Defendants stand is that transport was as per agreement the duty of the Plaintiff. Yes, that is so, but only if the contract was not breached. If it was breached as happened here then it was an expenditure that, like the deposit, was paid for no benefit. It is allowed at Ksh. 239,400/= which was the amount accepted in evidence by the Plaintiff's witness.

The next claim I need to consider is the claim for interest, both in the Deposit and in the transport charges. The Plaintiff in claiming this item states at paragraph 7 of the Plaint as follows: "The Plaintiff avers that the deposit of Kenya shillings 2.5 million paid to the Defendant and the money paid to the transporters to lift the goods from Mombasa to Nairobi were obtained by way of a bank overdraft facility

which the Plaintiff pays its bank at the rate of between twenty seven per cent (27%) and thirty two per cent (32%) per annum which interest the Plaintiff claims from the Defendant.”

This pleading does not allege that the Defendant was aware of the averments at that paragraph when the contract was entered into. The Defendant says it was not made aware of the same fact and did not enter into any contract with that mind. The Plaintiff refers to a letter of demand written to the Defendant in which claim of interest was referred to but clearly that is not the reference to the interest that is now being claimed. There is in fact nothing to show that the Defendants were made aware that the Plaintiff was paying interest in the money that was paid as deposit and as transport charges. Further, the evidence on record shows that the overdraft facilities in respect of which interest was being paid was a facility applied for and obtained in 1985.

According to Exhibit 14(a) – (j), the charge in respect of the same facility was established on 4.1.1985 whereas the contract was entered into on 13.2.1997, clearly that overdraft could not have been obtained solely for the purposes of the subject transaction. Kantilal Nathalal Chandaris in cross-examination stated in answer to one of the questions as follows:

“I see Exhibit 14(a) – (j) charge was established on 4.1.1985. I entered into contract on 13.2.1997, we are using this facility continuously, it was for our running business. There was no agreement on the contract as to where we would get the money to finance this transaction.”

I do not think it would be fair and just to ask the Defendant to meet the damages that were not anticipated by it at the time the contract was being entered into. The Defendant could not anticipate that it could in case of breach pay interest from a bank, which he was not made aware of at all and which did not arise directly as a result of the breach of the contract. I will not allow this claim as I find it remote. The Plaintiff says it obtained another overdraft and is claiming interest on the same. That other overdraft was obtained about 29.3.1997, over one month after the amount of Ksh. 2.5 million had been paid to the Defendant. It cannot and it has not been claimed to be the overdraft that granted finance to the Plaintiff to pay Ksh. 2.5 million. It was indeed overdraft for the running of Plaintiff’s business but not this particular one. It falls within the category of the first overdraft.

It is remote. At that particular time 29.3.97 if the Plaintiff was obtaining this more overdraft for purposes of this transaction, it could have surely informed the Defendant and the Defendant could have known into what financial difficulties it was putting the Plaintiff. Plaintiff did not do so. I do reject the claims for interest.

That leaves the claim for loss of profit which as I have stated, was entered on claim at Ksh. 2,354,100/= but at the hearing the witness put gross loss of profit at Ksh. 2,143,032/= but later reduced it to net profit which was Ksh. 1,750,000/=. This was based on the cost of caustic soda being sold at Ksh. 38/= according to Exhibit 18 and 18(a). The Plaintiff’s witness did admit that the prices were independently negotiated between the Defendant and different customers and no set price was available applicable to all sales and indeed none could exist. Plaintiff did not avail its own selling price. No buyers were said to be ready to buy the same goods and no buyer gave evidence of the price at which it was buying the same goods from the Plaintiff. Exhibit 18(a) talks of price of 36/= per kilo gram and lastly in coming to the figure it was claiming, the Plaintiff assumed or appears to have assumed two things, which are that the goods were received intact without any destruction or spillage whatsoever and secondly that it had also paid fully for the goods. This aspect is important because all that the contract document stated was that the goods bargained for were 190 pallets of 21 bags each of 50 Kg. (199500 Kgs) at a price of Ksh. 22.50 Ex- Mombasa. This meant that eventually the Plaintiff would only pay for what it receives and that is what it would sell. Although the Defendant did say at one time in a letter that the same goods were intact, it was clearly in evidence that there were some which were destroyed and some were split. It is in my mind clear that the Plaintiff’s calculations for profit are no more than arithmetical exercise not based on the facts or the ground and no wonder he had to change the figures from time to time in an attempt to meet the factual aspects. That claim is not proved with the standard required.

I now proceed to consider the counter-claim. In considering the same, I do want to state that the

Defendant's one witness was not of adequate help to the court. He set out to prove that 880 bags were lost – bags were lost due to delay by the Plaintiff to collect the goods and that was valued at Ksh. 990,000; that Breakage voucher was issued by the Customs for 1,567 bags valued at Ksh. 1,762,875, cost of repairs to the Godown floors and roof by the caustic soda when Plaintiff failed, or neglected to collect the same goods in time but these are precisely what he failed even to make an attempt to June. All he said was that when goods reached Mombasa, they were classified as dangerous and part of the consignment underwent self destruction and did not leave the port and that while plaintiff transported the goods 649 bags were destroyed at the hands of the Plaintiff and that thereafter because of the mishandling of the goods the Defendant applied for shortage and breakage examination and a further 1,556 bags were found to be corrosive and non-useful and that same bags required rebagging due to spilling and floor was destroyed. As to the destruction of the floor and roof, it is already clear from what I have said above that the goods were never legally transferred to Plaintiff and were in the Defendant's bounded warehouse rightly as they were still Defendant's property. The Defendant cannot therefore claim for the repair of what was destroyed by its own property. Further, in cross-examination this same witness admitted that it was Defendant's employees who put the offensive goods into their bounded warehouse. It cannot claim from the Plaintiff damages (if any) caused by its own employees. That takes care of the counter-claim for costs of repairs to Defendant's Godown floors and roof. It cannot be allowed. As to value of 880 bags lost due to the delay by Plaintiff to collect the goods, where is the evidence that 880 bags were lost? Where is the evidence that the same were valued at Ksh. 990,000? As to Breakage voucher, this witness admitted that it had stated in Exhibit D4 a letter dated 1st September 1997 that the Defendant had raised the complaint of caustic soda prices 199500 MTS in their bonded warehouse and described the stocks as "intact" in their bonded warehouse. Surely can such a person later claim and succeed that the same goods were not intact but that same were destroyed. Who can believe such a person? This is why I say DW1 was not of adequate help to the court. Counter-claim cannot succeed.

The sum total of the above is that the Defendant is in breach of the contract. It will refund Ksh. 2,500,000 that was paid as down payment, or will also refund transport cost of Ksh. 239,400/=. As this was a business transaction, I will order that the interest on Ksh. 2.5 million will be at court rates but will be with effect from the date the same cheque was paid to the Defendant and that was on 17.2.1997 till the date of the full payment. The interest on transport will be at court rates from 23.7.97 till the payment in full. The counter-claim is dismissed. Claim for interest at the rate the Bank was charging the Plaintiff is dismissed both in respect of Ksh. 2.5 million and in respect of the transport. Claim for loss of profit is also dismissed.

The Plaintiff will have two thirds of the costs of the suit and full costs of the counter-claim. Judgement accordingly.

Dated and delivered at Nairobi this 5th day of April, 2002.

J.W. Onyango Otieno

JUDGE