



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

CIVIL CASE NO. 684 OF 1996

ERASTUS G. NDUHIU T/A

EMAC ENTERPRISES PLAINTIFF

VERSUS

EXPRESS KENYA LIMITED DEFENDANT

JUDGMENT

The plaintiff is a businessman dealing in agro-chemical goods under the name and/style of Emac Enterprises. His claim against the defendant is that in the years 1993 and 1994, he delivered under a contract to the defendant goods valued at Shs.3,495,050/= to be safely and securely stored at a warehouse owned by the defendant. The plaintiff avers that it was a fundamental term of the contract that the defendant would ensure that the stored goods would remain secured while at the defendant's custody and that the defendant would release them to the plaintiff on demand. The plaintiff's complaint in this matter is that the defendant in breach of its duty under the said contract did not give possession of the goods to the plaintiff on demand; he claims that the defendant instead caused and/or permitted them to disappear by reason whereof the plaintiff was deprived of the goods and their value stated to be Shs.3,349,050/=. The plaintiff also complains that the defendant, its agents and/or agents were guilty of breach of trust and duty of care of the goods stored at the warehouse. Particulars of the alleged breach of duty and/or trust are given as follows:-

- a) Failure to take proper or any care at all to ensure the security of the goods.
- b) Failure to protect the goods from loss.

The defendant denies the plaintiff's claim and avers that all the goods stored by the plaintiff at the defendant's godown were released to him. The claim that the goods were worth Shs.3,349,050/= is also denied.

As to storage, the defendant avers in its defence that the items were received and stored at the defendant's warehouse at the plaintiff's own risk, a term of the storage agreement which the plaintiff was fully aware of and which he accepted. That notwithstanding, the defendant says that all reasonable and necessary measures were put in place to ensure security of the plaintiff's goods.

The defendant further denies that any breach of trust or duty occurred as alleged or at all and avers that the goods stored at its warehouse by the plaintiff were released to him when he required them. The circumstances under which this suit arises are that the defendant owns godowns or warehouses which it

rents to customers. The plaintiff was one such customer. He used to store chemical goods at the defendant's warehouses. Regarding the storage of the goods giving rise to this claim, it is common ground that some goods were stored; the question however is what and how many goods were so stored; whether or not all or some of them were later taken away by the plaintiff and whether any were lost. If some were lost, did the plaintiff have a duty of care to ensure that they were not lost? The value of the goods is also disputed.

The parties have filed in court agreed issues which are as follows:-

- “1. What goods were stored in the Defendant's warehouse?
2. Which goods were released and collected by the Plaintiff?
3. What was the value of the goods stored?
4. Was the value of the goods agreed upon between the parties at the time of entering into the storage agreement?
5. What were the terms and conditions of the storage agreement?
6. Was there a breach of the storage agreement?
7. Is the doctrine of *res ipsa loquitur* applicable?
8. Who should be condemned to pay the costs of the suit?

The plaintiff's evidence was that during the material time he stored 275 cartons of Decis, in respect of 220 of which he obtained storage receipts, another 34 cartons each containing 10 one litre bottles of Dursban, 8 cartons containing 799 scissors for pruning coffee trees, 100 bottles of Actellic, 1 kg of Fenitrothion and another 1 kg of octave. Regarding the storage of decis, the plaintiff claimed that he obtained storage receipts for 220 cartons only and despite having asked for them, he did not receive any storage receipts for the rest i.e. 55 cartons. As we shall see, the plaintiff's version of the story regarding those 55 cartons is different from what the defendant says.

The plaintiff further testimony was that out of the items he had stored at the defendant's warehouse, he collected only 189 cartons of Decis, 22 cartons of Dursban and 92 bottles of actellic, meaning, according to the evidence, that he did not collect 31 cartons of decis, 12 cartons of dursban and 8 bottles of actellic. He also claimed that he did not collect the 1 kg each of Fenitrothion and Octave or the 799 pairs of scissors. His claim is therefore for the value of those items which he says he did not collect from the defendant's premises. The value of all those goods as claimed by him is Shs.3,349,050/=.

According to the plaintiff's further evidence, the system of storing goods in the warehouse was that he would report at the defendant's office with his goods. He would then be given a clerk who would accompany him to the warehouse for the purposes of off-loading the goods. The goods would be offloaded by employees of the defendant and of the plaintiff upon which event they would be verified. A storage receipt would then be issued. The plaintiff stated that neither he nor his personnel had access to the warehouse and accordingly he could not store or remove any goods therefrom without the defendant's participation. He added that when collecting the goods from the warehouse, he would have to go to the warehouse with a clerk from the defendant who would give him a delivery note in duplicate signed by himself and the issuing clerk.

Upon collecting the goods an askari at the gate would inspect the goods he had collected and then retain a copy of the delivery note.

As will be obvious from the foregoing, the plaintiff's case is not based on any claim that he or his clerks personally took to the defendant's warehouse, the items comprised in the suit. The case is based on

documents on the basis of which the plaintiff claims that certain goods were stored at the defendant's warehouse. Those goods are evidenced by storage receipts Exhibits 1 to 14 which show that the following goods were stored:-

ITEM: DECIS		
Exhibit No.	Receipt No.	Contents
1.	2883	12 cartons
2.	2896	19 cartons
3.	1614	6 cartons
4.	1617	49 cartons
5.	1903	105 cartons
6.	1643	16 cartons
7.	2258	10 cartons
8.	2265	1 carton
9.	2282	2 cartons
	Total	220 cartons

In addition to the above, the plaintiff claims that he stored another 55 cartons of Decis in respect of which no storage receipts were issued.

ITEM: DURSBAN		
Plaintiff's Storage		
Exhibit No.	Receipt No.	Contents
10	3563	34 Cartons

ITEM: PRUNNING SCISSORS		
Plaintiff's Storage		
Exhibit No.	Receipt No.	Contents
11	3383 799 Pairs	

ITEM: ACTELLIC		
Plaintiff's Storage		
Exhibit No.	Receipt No.	Contents

12	3563	6 x 12 Litres
13	2282	2 x 12 Litres Each
13	2282	4 x 1 Litre
	TOTAL	100 Litres

ITEM: FENITROTHION

Plaintiff's Storage

Exhibit No.	Receipt No.	Contents
14	1616	1 x 1 Kg.

ITEM: OCTAVE

Plaintiff's Storage

Exhibit No.	Receipt No.	Contents
14	1616	1 x 1 Kg.

Thus the total quantities of the goods stored at the defendant's warehouse were:-

1. Decis - 275 cartons containing 12 litres each.
2. Dursban - 340 litres packed in 34 ten litre cartons.
3. Scissors - 8 cartons of assorted scissors comprising 799 pairs.
4. Actellic 50 EC- 100 bottles.
5. Fenitrothion - 1 litre
6. Octave - 1 kg.

Out of the above items, the plaintiff says he collected the following items:-

DECIS

Plaintiff's

Exhibit No.	Delivery Slip No.	Contents
15	62025	5 cartons
16	63906	1 carton
17	62950	167 cartons
18	63927	1 carton
19	64053	9 cartons

20	65197	3 cartons
21	65974	2 cartons
	62015	1 carton
	Total	189 cartons

DURSBAN

Plaintiff's	Delivery	Contents
Exhibit No.	Slip No.	
21	65974	2 cartons x 1 ltr bottles
22	71634	10 cartons x 10 ltr bottles
23	74024	3 cartons x 10 ltr bottles
24	68799	7 cartons x 10 ltrs bottles
	Total	22 cartons

ACTELLIC

Plaintiff's	Delivery	Contents
Exhibit No.	Slip No.	
24	68799	7 cartons x 12 litres bottles + 8 Loose bottles 1 litre each.

Total 92 Litre Bottles

Accordingly, the items said to have been lost were:-

1. Decis - 86 cartons.
2. Dursban - 22 cartons.
3. Pruning Scissor - 799 Pairs.
4. Actellic - 8 bottles.
5. Fenitrothion - 8 bottles of 1 litre each.
6. Octave - 1 kg.

The defendant's major line of defence is that firstly all the goods stored by the plaintiff at the defendant's warehouse were later collected by him under the following receipts.

EXH.NO:	DELIVERYRECEIPT NO.	DATE	QUALITY OF GOODS.
13	62025	18/3/93	1 x 20 litres Dildrex 1 x 12 x 1 litre Decis
14	63906	24/8/93	1 carton mancozen 1 carton Decis

15	62950	25/8/93	167 x 12 less 4 litres Decis 16 63927 3/9/93 1 carton
			Decis
17	64058	9/9/93	9 cartons Decis
18	65197	3/1/94	3 cartons Decis
19	65974	29/1/94	6 x 1kg packs Aliette 80WP 2 x 1 Litre Bottles Dursban
			2 x 12 x 1 Litre Decis
20	68799	15/8/94	7 cartons said to contain 12 litres each bottles plus 8
			bottles of Actellic
21	71634	12/8/95	19 cartons x 10 bottles x 1 litre Dursban.
22	74024	4/4/96	3 cartons x 10 Bottles x 1 litre and 1 carton x 6
			bottles x 1 Litre Dursban.
23	62015	6/3/93	1 carton Decis
24	64085	9/10/93	2 x 20 litres Dursban.
25	65973	26/1/94	32 empty cans each 20 litres.
26	67142	23/4/94	14 cartons STC Dursban 18 bags of Kocide 101.
27	68445	1/7/94	2 x 20 litres empty cans.

The second limb of the defence is that the mere production of storage receipts is not sufficient or adequate proof that any such goods were infact stored as the description of the goods in the storage receipts was not based on any physical verification of the goods but on what the plaintiff stated was contained in the cartons and/or containers. That is indeed the reason why in virtually all the storage receipts the words “said to contain” are used. They clearly indicate that only the plaintiff knew exactly what was contained in the cartons and that the defendant was not concerned or interested in the individual items stored because it did not know what they were. This position is confirmed by the evidence of the defendant’s witness Nancy Ndichu (DW 1) whom I found to be a most reliable witness. Her testimony is to be preferred to that of the plaintiff who in cross examination was forced to change his story on more than one occasion.

Mrs. Ndichu’s testimony was that the defendant could not be held liable for individual items because it was not the business of the defendant to store items but to lease space. In that respect she testified that bays No. 5A and 6A were leased to the plaintiff. She also said that the defendant did not have expertise in chemicals and there was therefore no way it could tell what individual chemicals the plaintiff, who used to store chemicals, had in the warehouse. According to DW1, the plaintiff used to store his items in the space he had leased just like any other customers i.e. at his own risk.

The weakness of the plaintiff's case is in my view demonstrated by the fact that he selected only a few of the storage receipts which were available as the foundation of his case and omitted others which he could have used to prove that other items were also stored and possibly lost. It is also evident that even after accusing the defendant of having lost his goods, the plaintiff continued to collect goods of a description similar to those allegedly lost from the defendant warehouses without indicating whether they were part of the goods earlier alleged to have been lost or whether they were stored under a separate arrangements. Given that position and also because neither party kept a running record of any of the goods stored or collected, I entertain a very strong suspicion that what the plaintiff has presented to this court as his case is not a correct or true picture of what exactly happened.

The evidence clearly establishes a strong probability that goods stored under a particular name might have been collected by the plaintiff under a different one.

Be that what it may, to go back to the individual items, it is to be noted that the plaintiff claims he lost 275 cartons of Decis containing 12 litres each. The basis of that claim is obscure because, if the figures are looked at very carefully, even going by the plaintiff's own figures, which I must observe, I find unreliable, it emerges that he collected more Decis than he stored. In arriving at this conclusion, I have not taken into consideration the 55 cartons in respect of which he claims no storage receipts were issued.

I decline to take the 55 cartons into account because, since this claim is based on documents, the absence of documents means that there is no evidence to sustain the claim. Secondly, the figure of 55 cartons is clearly suspicious for it appears to have been directly lifted from the letter dated 8.7.1994 (D. Exh. 32) written by DW1 following the complaint by the plaintiff that some of his goods were missing. What the plaintiff appears to have attempted to do with respect to that figure of 55 cartons mentioned in D. Exh. 32 is to distort what Mrs. Ndichu intended to convey by her analysis of the results of the stock taking done on 10.6.1994 which was that the plaintiff's complaints lacked substance and instead to use the figure in an attempt to show that storage receipts for 55 cartons were not issued. Indeed the fact that the plaintiff had the courage to use that figure in his attempt to build what is clearly a false story around the defendant's alleged failure to issue 55 storage receipts not only demonstrates how fictitious this claim is but also shows what type of witness we are dealing with.

For those reasons, I do not believe that the plaintiff stored some 55 cartons or any other quantity of Decis for which no receipts were issued as alleged or at all. With regard to the claim for the alleged loss of dursban, the plaintiff testified that out of the 32 cartons of dursban which he had stored at the defendant's warehouse vide storage receipt No. 3563, he collected only 22 cartons thus leaving 12 cartons of the product unaccounted for and hence the claim for the value of that number of cartons. He however omitted to mention that under receipt No. 3563 (Exh. 10), the number of cartons shown as having been stored was much higher than the 34 referred to above. According to that document, some 8 X 1 LTR (which of course does not make a lot sense) of dursban was stored. It is not clear why all the items were not included in the claim.

Further the evidence available shows that even after complaining of the alleged loss of his goods in his letter dated 13.6.1994 (E. Exh. 31) the plaintiff continued to collect some of the items allegedly lost. Thus on 12.8.1995, he collected 10 cartons of Dursban and on 4.4.96 he collected 4 cartons of the same product. It is to be observed that the last collection occurred even after the filing of this suit. Indeed on the basis of the delivery slips tendered on behalf of the defendant, the plaintiff collected more Dursban than he claims he stored. So what was going on? Does this not show that the plaintiff's whole claim having been based, as it is, on selected storage receipts and delivery slips does not add up and is wholly untenable?

Turning now to the claim in respect to pruning scissors, the plaintiff claim that he stored 799 pairs of the item as evidenced by storage receipt No. 3383 (Exh. 11). The receipt itself shows that the contents of the items were not checked by anyone at the defendant's place and what is stated in the receipt is based on what the plaintiff told the officer of the defendant attending him at the time. In view of the doubts I entertain regarding the genuineness of this claim, I am unable to accept on the basis of the storage receipts alone and the plaintiff's word for it that such a large number of pruning scissors was stored as claimed.

This view is reinforced by:-

(a) The evidence of DW1 that it would have required a forklift to remove the 8 cartons of pruning scissors from the delivery vehicle and deliver them to the warehouse. DW1's evidence was that no forklift was used because if that had happened, she would have been aware of it. (b) There is clear evidence of doctoring of documents by the plaintiff. In the Storage Receipts No. 1616 (Plaintiff's exhibit No. 14 and Defendant's Exh. 3) the words 1 X 1 kg Fenitrothion + 1 X 1 kg Octave appearing in Exh. 14 do not appear in D, Exh.3. The plaintiff in whose Exh. the additional words appear, did not give any reasonable explanation for the alteration in the document and it must therefore be assumed that he irregularly made the alterations for purposes which he has chosen not to reveal to the court.

Whatever the reasons for the alterations, the improper alterations show that the documents the plaintiff's relies on to prove his case cannot be relied on and should not be accepted as the foundation of his case. For the above reasons, I find that the plaintiff has not tendered any credible or sufficient evidence to establish that the items on which the claim in this suit is based were either stored and/or lost at the defendant's godown or that the defendant owed him any duty of care in respect of any goods stored at the warehouse. Accordingly, I resolve all the issues framed above in favour of the defendant. As to the issue of *res ipsa loquitur*, that was not canvassed before me by any of the parties and accordingly, I will not address it.

For all the above reasons, the plaintiff's suit fails and is dismissed with costs.

Dated at Nairobi this 9th day of March, 2001.

T. MBALUTO

JUDGE