



REPUBLIC OF KENYA



**Atta Kenya Limited v Commissioner – Customs and Border Control & 4 others
(Civil Case E030 of 2020) [2025] KEHC 12135 (KLR) (4 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 12135 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL CASE E030 OF 2020
F WANGARI, J
APRIL 4, 2025**

BETWEEN

ATTA KENYA LIMITED PLAINTIFF

AND

COMMISSIONER – CUSTOMS AND BORDER CONTROL 1ST DEFENDANT

GRAIN BULK HANDLERS LIMITED 2ND DEFENDANT

MICHAEL ODHIAMBO OLOO T/A OLOO & CHATUR

ADVOCATES 3RD DEFENDANT

GRAIN INDUSTRIES LIMITED 4TH DEFENDANT

BEYOND AUCTIONEERS 5TH DEFENDANT

JUDGMENT

1. Through a plaint dated 28th October, 2020 and filed on 24th December, 2020, the Plaintiff sought for judgement against the Defendants jointly and severally for the following reliefs: -
 - a. A declaration that the auction and sale of the 13,196.3138 tonnes of wheat was illegal for want of authority and approval of the 1st Defendant;
 - b. A declaration that the said auction was marred with irregularities, fraud and conflict of interest and therefore Grain Industries Limited did not competitively purchase the wheat;
 - c. A declaration that the auction done on 19th June, 2017 was done contrary to a court order issued on 12th May, 2017 in Nairobi HCCC No. 195 of 2017, Premier Flour Mills & 7 Others v Ecobank Kenya Limited, EBI SA Groupe Ecobank and Ecobank South Sudan Limited;
 - d. The 4th Defendant was not innocent purchaser and therefore it did not acquire indefeasible title of the wheat sold;



- e. Kshs. 730,292,207.28/=;
 - f. Interest on (e) above from the date of the auction till payment in full;
 - g. Loss of anticipated profits;
 - h. Interest on loss of anticipated profits;
 - i. Costs of the suit;
 - j. Any other relief the Honourable Court may deem fit and proper.
2. Upon service of the pleadings, all the Defendants entered appearance and filed their respective statements of defence. They denied the Plaintiff's claims and sought that the suit against them be dismissed with costs.

Parties' Pleadings

3. In its plaint, the Plaintiff avers that between 2013 and 2014, together with its sister company known as Premier Flour Mills Limited, it entered into various contracts with a company known as Louis Dreyfus Company Limited (LDCL) for sale of 38,500 Metric Tonnes of Milling Wheat. Out of the 38,500 Metric Tonnes imported, 29,500 Metric Tonnes belonged to it and they were shipped through two vessels being Kiran Marmara and Clippers Bliss. The total costs for purchasing both the Russian milling wheat and Ukrainian wheat was USD 7,565,555 and which amount is said to have been fully paid to LDCL.
4. Further to the purchase price, the Plaintiff avers that it incurred other charges such as taxes paid to Kenya Revenue Authority (KRA), charges to Kenya Ports Authority (KPA), shipping, purchase of bags and customs warehouse rent. It is the Plaintiff's further averment that when the wheat arrived in Kenya, it was placed under the control of the 1st Defendant and as such, custom warehouse rent was chargeable. However, the wheat was under the custody of the 2nd Defendant pending clearing by 1st Defendant. According to the Plaintiff, it was under statutory duty to pay custom warehouse rent to the 1st Defendant and storage charges to the 2nd Defendant.
5. The Plaintiff states that it fell in arrears of the contractual storage charges payable to the 2nd Defendant and the 1st Defendant's statutory custom warehouse rent when its bank failed to honour its financing obligation. With this occurrence, it engaged the 1st Defendant with a view to have it waive the custom warehouse rent and it was waived to 30% of the accrued rent through a letter dated 8th September, 2017. In the same breath, it engaged the 2nd Defendant with a view to allowing the Plaintiff to organize for alternative financing of the storage charges.
6. It avers that despite the pending engagement, the 2nd Defendant engaged the 3rd Defendant with a view to recover the storage charges and which the law firm issued a demand letter and later indicated that they would proceed to auction the wheat under the provisions of *Disposal of Uncollected Goods Act*. It is the Plaintiff's position that the 3rd Defendant instructed the 5th Defendant to initiate the process of disposing off the wheat to enable recovery of storage charges. It posits that the threat to dispose off the wheat was illegal since no authority had been granted by the 1st Defendant and thus the Plaintiff could not conceive how the auction could take place without such authorization.
7. Despite lack of authorization from the 1st Defendant, the Plaintiff states that on 21st April, 2017, the 5th Defendant placed a Gazette Notice No. 3912 claiming that it could sell some 13,196.3136 Metric Tonnes of the assorted wheat belonging to the Plaintiff via public auction. It is averred that on 10th



June, 2017, the 5th Defendant placed a notice on Saturday Nation inviting bids for the purchase of the 13,196.3136 Metric Tonnes of the said wheat and also communicated the conditions of sale. It is stated that the auction purportedly took place on 19th June, 2017 where the 4th Defendant emerged as the successful bidder.

8. After the said auction, it is the Plaintiff's position that LDCL, the company that had sold the wheat to it moved to court on 14th July, 2017 through HCCC No. 70 of 2017, Louis Dreyfus Company Limited v Grain Bulk Handlers Limited, Premier Flour Mills Ltd and Atta Kenya Limited. It is averred that the suit was seeking to stop release of 6,964.7699 MT of the wheat on account that the Plaintiff had not paid USD 2,263,759. According to LDCL, the contract of sale had retention of title clause and thus the title to the goods had not passed to the Plaintiff. It avers that it defended the suit on the ground that it had fully paid for the wheat and after some time, LDCL compromised the suit and the same marked as settled. It however, denies any involvement in the settlement of the matter.
9. The Plaintiff states that during the pendency of the suit, it received a letter dated 3rd July, 2017 from the 3rd Defendant informing it that the wheat had been sold under instructions of the 2nd Defendant and where the 4th Defendant emerged the highest bidder having placed a bid of Kshs. 217,475,251/=. It is said that the letter in issue came to its attention in early September, 2017 and it was shocked to learn that the wheat had been sold on 19th June, 2017 without the authority of the commissioner. Having learnt of the auction, it wrote a letter dated 20th September, 2017 complaining to the 1st Defendant's Office Manager of Customs and Excise.
10. It is averred that in response, the 1st Defendant wrote to the 2nd Defendant a letter dated 3rd October, 2017 demanding an explanation on how the wheat was sold without the commissioner's authority and which sale amounted to interference of goods under customs control without the knowledge and approval of the commissioner. Making reference to the letter dated 3rd October, 2017, it is the Plaintiff's position that no authority and approval of the Commissioner was sought by the 2nd Defendant before auctioning the wheat despite the same being under customs control pursuant to section 16 of the East African Community Customs Management Act (EACCMA).
11. The auction sale is said to have been an illegality for want of authority to deal with goods under customs control. It is contended that after being instructed to sell the wheat by the 2nd Defendant, the 3rd Defendant engaged in misconduct by causing the disposal of the wheat to the 4th Defendant where Michael Odhiambo Oloo, a partner at 3rd Defendant is a director. The sale is thus said to have been a façade marred with conflict of interest.
12. Other than the auction being illegal for want of authorization, it is averred that it was tainted with illegality for among other reasons, the 5th Defendant did not proclaim the goods before selling thus contravening Rule 12 of the Auctioneers Rules, 1997 and further that no redemption notice was issued to it. The Plaintiff goes ahead to enumerate particulars of illegality and fraud against the Defendants. As a result of the fraud and illegality, it is the Plaintiff's position that the auction sale on 19th June, 2017 was illegal, null and void and could not confer title to the 4th Defendant and divest title from the Plaintiff.
13. The Plaintiff states that because of its financiers' failure to honour the financing agreement with its sister company, Premier Flour Mills Limited, it filed a suit being Nairobi HCCC No. 195 of 2017 seeking to have them compelled to honour the agreement. The Plaintiff avers that an order was issued on 12th May, 2017 requiring that 16,708.00 Metric Tonnes of wheat held by the 2nd Defendant be held to the order of Ecobank Kenya Limited. It states that this order was communicated to the 2nd Defendant but despite the order being in existence, the 2nd Defendant still proceeded with the auction.



14. The Plaintiff has tabulated the wheat's purchase price exclusive of other charges and that the auction sale of Kshs. 217,475,251.00/= was over 68% less the purchase price thus concluding that there was an undervaluation. Other than the purchase price, the Plaintiff avers that it incurred other charges to the tune of Kshs. 363,660,868.45/= thus in total, it lost a sum of Kshs. 730,292,207.28/= which it is now claiming from the Defendants. It also avers that it would have made a profit from the sale.
15. It further avers that after the wheat was sold at paltry Kshs. 217,475,251.00/=, various deductions were made and only Kshs. 28,492,951 remained and which amount the 3rd Defendant indicated was supposed to be released to the Plaintiff on certain conditions. The Plaintiff did not accede to the conditions since according to it, the wheat had been sold illegally and thus the 3rd Defendant continued to hold the money illegally and the same is recoverable summarily with interest accrued thereon. The Plaintiff thus seek for judgement against the Defendants jointly and severally as prayed.
16. On the part of the 1st Defendant, it avers that it is a stranger to the contractual relations of the Plaintiff with the other mentioned parties. It states that it is statutory body established under the Kenya Revenue Act as the sole agent of the Government for assessment and collection of all government revenue and in exercise of the said mandate, it enforces and administers various provisions of written laws among them EACCMA, 2004 and other revenue acts that make provision for collection and administration of taxes.
17. The 1st Defendant denies the Plaintiff's allegation of contravention of statutory provisions on account of purported disposal of wheat belonging to the Plaintiff. It further denies the allegation of collusion or illegality and further avers that illegality must be specifically pleaded and that particulars of the alleged illegality must be stated on the face of the pleading. It thus concludes that the Plaintiff's suit be struck out or be dismissed with costs.
18. The 2nd Defendant equally resists the claim. Through its amended defence dated 15th February, 2021 and filed on 16th February, 2021, it confirms that on diverse dates between 3rd June, 2014 and 12th March, 2016, it received for handling and storage at its terminal silos various wheat consignments from MV Kiran Marmara and MV Clipper Bliss imported by LCDL. It is confirmed that the Plaintiff was the beneficial owner of 29,500 Metric Tonnes thereof.
19. It states that by virtue of a private arrangement between the Plaintiff and LCDL, the Plaintiff or its nominee was entitled to have the consignment or any part thereof released upon compliance with customs clearance from the 1st Defendant and release order from LCDL. From 5th February, 2015, the Plaintiff having cleared with the 1st Defendant and LCDL collected or received by itself or its nominee Premier Flour Mills Ltd from the 2nd Defendant various portions of consignment amounting to 16,189.6168 Metric Tonnes. As a result, 13,196.3138 Metric Tonnes were left stored and handled at its terminal silos.
20. It avers that the Plaintiff was under an obligation to pay it storage and handling charges on the agreed terms and rates prior to release of such consignment or any part thereof. It confirms that the Plaintiff defaulted in payment of storage and handling charges due to it in respect to the consignment.
21. It avers that it was neither made aware nor privy to any arrangement the Plaintiff had with its banks to finance payment of the customs warehouse rent due to the 1st Defendant and the storage and handling charges due to it. As such, it was the 2nd Defendant's right to claim storage and handling charges from the Plaintiff and was thus not bound or inhibited by any default and or lack of financing by the Plaintiff's undisclosed and unknown banks.



22. It further states that it was neither made aware of nor privy to any engagement the Plaintiff had with the 1st Defendant to waive customs warehouse rent and or any such waiver granted. Similarly, it is the 2nd Defendant's position that any such engagement and or waiver did not affect or restrict its rights to claim and recover storage and handling charges due from the Plaintiff in respect of the consignment. The 2nd Defendant further states that the Plaintiff's engagement with the 1st Defendant was mischievously commenced long after the disposed consignment had been auctioned with the Plaintiff made aware of the disposal.
23. The 2nd Defendant states that prior to the disposal of the consignment, it conceded to engage the Plaintiff on settlement of the handling and storage charges due to it but despite the concession to have the accrued storage and handling charges paid within fourteen (14) days, the Plaintiff still defaulted on its own proposals. It further states that prior to disposal, it instructed the firm of Oloo & Chatur Advocates to which the 3rd Defendant is a partner to demand the debt accrued and a demand letter dated 8th November, 2016 was duly served upon the Plaintiff.
24. It avers that having failed to comply with the demand letter, a further letter dated 28th March, 2017 was issued and duly served upon the Plaintiff giving it notice of the 2nd Defendant's intention to dispose off the consignment under the *Disposal of Uncollected Goods Act*. The Plaintiff still failed to comply with its second demand. By a letter dated 6th April, 2017, the 2nd Defendant directly instructed the 5th Defendant to initiate and proceed to dispose the consignment under the provisions of the *Disposal of Uncollected Goods Act*.
25. According to the 2nd Defendant, there was compliance of all the requirements under the Act and the disposal was scheduled to be conducted on 20th May, 2017. However, due to a last minute request from the Plaintiff, a further fourteen (14) days was given to allow the Plaintiff redeem the consignment and as such, the 2nd Defendant pleaded with the 5th Defendant to have the auction stopped despite several bidders having attended to make their bids. It is averred that the Plaintiff once again failed to abide by its own proposal and indulgence and therefore, on 5th June, 2017, the 2nd Defendant once again proceeded to instruct the 5th Defendant to proceed with the disposal.
26. It avers that the 5th Defendant published a notice of intended auction in the Daily Nation issue of 10th June, 2017 with the auction set for 19th June, 2017. On the said date, the auction proceeded and the 4th Defendant emerged as the highest bidder and paid the entire bid sum and a memorandum of sale, receipt and a certificate of sale was issued thus conferring the 4th Defendant with property, title and ownership in the consignment. It is averred that at the time of the auction of the consignment, the portion of the consignment released to the 4th Defendant was not under customs control the Plaintiff having paid all the customs and duty due on the consignment. It is averred that after the auction, the only cargo released to the 4th Defendant was cargo for which the Plaintiff had paid duty and custom releases obtained.
27. The 2nd Defendant contends that the Plaintiff was aware of the disposal even prior to commencement of the disposal process. It maintains that duty and taxes having been paid or settled on the consignment and even portions released and received by the Plaintiff or its nominees, the consignment was no longer under customs control within the meaning of the EACCMA. Therefore, the sale and disposal to the 4th Defendant was thus lawful, regular and valid.
28. The 2nd Defendant states that the instructions and process of the disposal of the consignment was undertaken solely and exclusively through its direct instructions to the 5th Defendant and at no time was the 3rd Defendant involved in the process of disposal. It avers that the 4th Defendant was represented



in the auction by its Chief Executive Officer (CEO) and not the 3rd Defendant. It is the 2nd Defendant's position that the 3rd Defendant did not take part in the auction nor take part in any bid or play any role in the disposal process other than issuing demand letters for debt collection and release of the proceeds of the auction to the Plaintiff.

29. The 2nd Defendant deny having been aware or being a party to or bound by any orders made in Nairobi HCCC No. 195 of 2017, Premier Flour Mills Ltd & 7 Others v Ecobank Kenya Ltd and that it became aware of the suit or orders made therein way after the disposal of the consignment. On the Plaintiff's claim for a sum of Kshs. 730,292,207.28/=, the 2nd Defendant states that having collected 16,189.6168 metric tonnes, only 13,196.3138/= was still available. Therefore, the tonnage, values, prices or costs assigned or claimed by the Plaintiff are untrue and an attempt to gain double and unjustifiable benefit. It therefore prayed that the Plaintiff's suit be dismissed with costs.
30. The 3rd Defendant filed his statement of defence dated 3rd February, 2021 on 4th February, 2021. He denied the Plaintiff's averments between paragraph 7 through to 15. He however, confirms that as the 2nd Defendant's advocate, he was aware of the existence of a bailor – bailee agreement or relationship over the cargo subject matter of the suit but which pact was breached by the Plaintiff giving rise to the subject suit. He denied knowledge of the Plaintiff seeking waiver of custom warehouse rent and that by the time the Plaintiff was seeking the said waiver in September, 2017, the Plaintiff was aware that the subject goods had already been sold through public auction held on 19th June, 2017.
31. He states that through his partnership, he was solely acting for the 2nd Defendant as they generally do in many cases including generally undertaking debt collection duties. Through a storage agreement completed between the Plaintiff and the 2nd Defendant over the subject cargo, the Plaintiff had accumulated colossal amounts in unpaid charges which the 2nd Defendant sought to recover.
32. He details the activities that took place from when it issued the demand letter dated 8th November, 2016 until 5th April, 2017 when the 2nd Defendant through its finance director instructed the 5th Defendant to initiate the process of Disposal of Uncollected Goods pursuant to the Act including publication of the requisite gazette notices and advertisement in local dailies before sale. He also states that the initial auction was to be conducted on 20th May, 2017 but was postponed upon the Plaintiff seeking indulgence from the 2nd Defendant. He confirms that the auction took place on 19th June, 2017 and the 4th Defendant emerged as the highest bidder.
33. On the balance of the amount, he states that the Plaintiff despite being advised to collect the same upon complying with the conditions set, the Plaintiff declined to do so and the money continues to be retained by his firm. He denies causing disposal of the subject cargo to the 4th Defendant and thus no misconduct on his part. The 5th Defendant is said to have been directly engaged by the 2nd Defendant and indeed signed a letter of instruction. He avers that he exclusively acts for the 2nd Defendant and not the 4th Defendant and this fact was acknowledged by the Plaintiff.
34. On the 5th Defendant, he states that being a licensed auctioneer and an officer of the court, at no time did he instruct or direct the auctioneer on how to conduct the auction. On his directorship in the 4th Defendant, he avers that he is nominal director and being a practicing advocate, he is not engaged in day to day running of the 4th Defendant's business operations. He equally states that he is not even a shareholder of the 4th Defendant and thus stood to gain nothing by influencing the sale of the subject cargo to the 4th Defendant.
35. Making reference to the *Disposal of Uncollected Goods Act*, the 3rd Defendant states that under the said Act, there is no provision for an auctioneer to proclaim the goods before auction and in any event,



several notices were issued to the Plaintiff to redeem the subject goods before auction but were not adhered to. He concludes that the Plaintiff is not entitled to the reliefs sought and the suit against him ought to be dismissed with costs.

36. The 4th Defendant filed its statement of defence dated 6th February, 2021. In brief, it states that it saw a newspaper notice in Daily Nation issue of 10th June, 2017 to the effect that the 2nd Defendant through the 5th Defendant was intending to sell cargo subject of the suit consisting of 13,196.3138 Metric Tonnes of wheat pursuant to the provisions of the *Disposal of Uncollected Goods Act* in order to recover their accrued charges. Being its line of business, it was interested in participating in the bid. It made inquiries with the 5th Defendant and was informed that the cargo belonged to the Plaintiff.
37. It states that it participated in the scheduled auction on 19th June, 2017 and emerged the highest bidder with a bid of Kshs. 217,475,251.00/= and it paid the amount in full upon conclusion of the auction. In the auction, it was represented by its CEO. It was issued with a certificate of sale thereby title to the said cargo was vested on it. It states that at the time of sale, the cargo was being held at the 2nd Defendant's silos and since it did not have warehousing facilities of its own, it entered into a storage agreement with the 2nd Defendant where it was agreed that the wheat would be stored in the 2nd Defendant's warehouses from where it could be released to it on demand.
38. Pursuant to the storage agreement, 9,072.7535 Metric Tonnes of wheat was released to it by the 2nd Defendant thus leaving a balance of 4,113.02 Metric Tonnes. It sought on several occasions to have the balance released until 16th August, 2017 when it formally demanded release of the balance. Through a letter dated 28th August, 2017, the 2nd Defendant informed it that a suit had been lodged by LDCL and orders barring release issued. It thus sought for patience pending further court orders. To date, the balance is yet to be released. It sought for the claim against it to be dismissed with costs.
39. Together with the statement of defence, the 4th Defendant also filed notice of claim against Co-Defendant dated 26th May, 2021. It sought for the balance to be released as it continued suffering economic loss and damage.
40. The 5th Defendant filed its statement of defence dated 10th February, 2021 on 11th February, 2021. It confirmed receiving instructions from the 2nd Defendant on 10th April, 2017 through a letter of instructions dated 6th April, 2017. The instructions were to the effect that he disposes off by way of public auction 13,196.3138 Metric Tonnes assorted wheat pursuant to the provisions of *Disposal of Uncollected Goods Act*. It vehemently denies receiving any instructions from the 3rd Defendant or any firm of advocates but from the 2nd Defendant.
41. Upon receiving the instructions, its representatives visited the 2nd Defendant's premises where the consignment was stored on 12th April, 2017 to inspect and view the consignment. The representatives found the consignment to be in bulky form but were already bagged in gunny bags. During the said visit, it was furnished with cargo manifests in respect to the consignment by the 2nd Defendant which proved that the Plaintiff was the owner thereof. It was also furnished with demand letters dated 8th November, 2016 and 28th March, 2017 issued and duly served upon the Plaintiff by the 2nd Defendant's debt collection advocates.
42. In view of the earlier demand notices issued to the Plaintiff, in compliance with the *Disposal of Uncollected Goods Act*, it caused to be prepared and published a Gazette Notice dated 12th April, 2017 and the same published in the Gazette issue of 21st April, 2017. The Gazette Notice granted the Plaintiff or any other owner of the consignment 21 days to redeem the consignment failure which the same would be disposed off at a public auction.



43. Upon expiry of the redemption period, it proceeded to advertise the consignment for sale by public auction in the Daily Nation Newspaper issue of 13th May, 2017 giving a further seven (7) days' which scheduled the sale by public auction to take place on 22nd May, 2017 with the time, place and the conditions of sale therein indicated. It is said that neither the Plaintiff nor the owner of the consignment came forward to redeem the consignment.
44. On 22nd May, 2017, the public auction was convened and was attended by several bidders. However, the auction was called off at the last minute under the instructions of the 2nd Defendant who informed the 5th Defendant that the Plaintiff had approached it to settle the storage charges due prompting the public auction to be suspended for 14 days to allow negotiations and settlement of the amount due. It is averred that on 6th June, 2017, the Plaintiff having defaulted on its own proposals to settle the accrued storage charges, legal and auctioneer charges, the 2nd Defendant instructed the 5th Defendant to continue with the disposal vide a letter dated 5th June, 2017.
45. The 5th Defendant narrates what transpired from 10th June, 2017 to 19th June, 2017 when the public auction took place and the highest bidder being the 4th Defendant. It was directed on the manner of disbursements by the 2nd Defendant on 20th June, 2017 and it complied. The 5th Defendant reiterates that it fully complied with the law and thus the suit against it be dismissed with costs.

Summary of the Plaintiff's Evidence

46. The Plaintiff called two witnesses. Diamond H. Lalji testified as PW1. He adopted his witness statement dated 28th October, 2020 as his evidence in chief. He equally produced four (4) sets of documents in bundles dated 28th October, 2020, 26th May, 2023, 9th June, 2023 and 26th October, 2023. Briefly, he stated that the Plaintiff is one of the oldest milling companies in Kenya. Their main business is buying and importing wheat. In the year 2013 – 2014, it imported wheat for processing. The value of the wheat was USD 7,565,555. He stated that the 2nd Defendant has monopoly over warehousing.
47. He stated that 29,500 Metric Tonnes were imported and he cleared a part leaving a balance of 13,196.3738 Metric Tonnes being subject of the suit herein. His relationship with Mohammed Jaffer, the 2nd Defendant's owner was more of a business relationship. He confirmed that in April, 2017, there was an advertisement for sale of 13,196.3738 Metric Tonnes through public auction. He intervened through the 2nd Defendant's director and the auction was cancelled. He states that he became aware of the auction through the law firm of Oloo & Chatur through a letter dated 3rd July, 2017. He adds that the letter was received in the end of August or early September.
48. According to him, the sale was done at Kshs. 217,475,251/= and after deducting the storage charges and other charges, a balance of Kshs. 28,492,951 which money the Defendants still hold. He states that the value of the wheat was Kshs. 730,292,207.28/= and that the total cost was known to the 2nd Defendant. The auction sale represented 27% of the total value. He referred to an order of injunction in HCCC No. 70 of 2017 dated 4th July, 2017. The witness states that the goods were systematically transferred to the 4th Defendant before the auction.
49. The witness then narrated the relationship between the 2nd to 4th Defendants and concluded that there was conflict of interest. He stated that his fifty (50) years of life was blown in one (1) day. He avers that bank auctioned his properties worth Kshs. 4 Billion.
50. On cross examination by Advocate for the 1st Defendant, he stated that the wheat was shipped through two (2) vessels, Kiran Marmara and Clipper Bliss. On HCCC 70 of 2017, he stated that the case was instituted by the supplier of the wheat and that the 2nd Defendant was fully aware of the same. He



confirmed that the Commissioner of Customs and Border Control was not a party. Further, he had a free pass to collect the goods from the warehouse and that KRA was not aware of the disputes.

51. He stated that after status quo was obtained, he focused on getting a waiver from KRA as he sorted his finances with the banks. He denied seeing the auction advert since according to him, it was done on Saturday, 17th May, 2017. He added that KRA was involved as nobody would remove the cargo without their authority. Ecobank had an interest in the cargo as it had financed them. KRA was not involved at that time. He confirmed that he was to pay storage charges to the 2nd Defendant and after ninety (90) days, rent to KRA. He could not pay the 30% to KRA since the cargo was auctioned. He confirmed that he had sued KRA because the goods were under customs control at the time of auction.
52. He confirmed that the goods were moved to the 2nd Defendant's premises after payment of taxes. He also stated that the 1st Defendant did not advertise the goods for sale. He averred that he could do whatever he wanted with his cargo subject to payment of rent to 1st Defendant and storage to 2nd Defendant. He concluded that some cargo was released to the Plaintiff before the auction and that the cargo was stolen amounting to a criminal act.
53. On cross examination by Counsel for the 3rd Defendant, he confirmed that the letter at page 75 of his bundle was authored by Shazeen Chatur who is not a party to the suit. On the total claim, he stated that it was for the total value including the cargo released to him. He stated that he was owing between USD 1.2 and 1.3 million as rent to the 2nd Defendant. He asked for 14 days to pay the outstanding rent and indeed he was granted. His reason was that there was delay in the bank process which he had no control of. On the sum claimed, he stated that it belonged to the Plaintiff and Premier Mills though the Plaintiff was representing Premier Mills.
54. He confirmed that the Plaintiff sued Ecobank and the 2nd Defendant was not a party. He confirmed that the Plaintiff was sued in HCCC 70 of 2017. He concluded that there was fraud in the transaction as there was collusion between the Defendants. He stated that the 1st Defendant is not correct to state that the goods were not subject to custom control. Lastly, he confirmed that he still had the waiver.
55. On cross examination by Counsel for the 2nd and 5th Defendants, he confirmed that the consignment was subject to taxes and storage charges and that storage and handling charges were due to the 2nd Defendant. He confirmed that LDCL imported the cargo and that they (LDCL) were claiming part of the consignment. He stated that LDCL had not released part of the consignment to the Plaintiff. He added that KRA still had a stake in the goods. Goods were to be released to the Plaintiff by LDCL once rent was payable to the 1st and 2nd Defendants.
56. He confirmed that the auction took place on 19/6/2017 and that at that point, storage charges had not been paid. He was aware of the rent charges due to the 2nd Defendant. He confirmed being aware of a gazette notice that was issued and that it did not move to court to challenge the gazette notice. The reason was that he was talking to Mohammed Jaffer. He denied receiving any auction notice thereafter. He confirmed that there was an advertisement in the newspaper more than two weeks after the gazette notice. However, they were not aware of the advertisement.
57. He stated that on 19/5/2017, he wrote to the 2nd Defendant requesting for time to pay and that he tentatively gave 14 days. He averred that non-payment was beyond his control as the banks were working on the loan application. Referred to the letter dated 19/5/2017, he confirmed that it did not indicate any meeting with Jaffer. He added that no auction took place within the 14 days he sought and that no consignment was disposed on 22/5/2017. Referred to the 5th Defendant's letter dated 22/5/2017, he confirmed that auctioneers gave reasons why the auction did not take place. It was to give room for negotiations and was received on 23/5/2017.



58. He stated that there was another advertisement on 10/6/2017. On Ecobank, he averred that they were the financiers and were endorsed on the Bill of Lading. Referred to the Bills of Lading in his bundle, he confirmed that Ecobank was not endorsed in any Bill of Lading. On Premier Flour Mills, he conceded that it was a different entity though it financed the Plaintiff. He also confirmed that all documents were in the name of the Plaintiff. He did not have an agreement between the Plaintiff and Premier Company. On the filed agreement, he confirmed that it was between the Plaintiff, Premier Flour Company and LDCL and was only limited to what was payable to LDCL.
59. He added that the auction took place over one (1) month after advertisement. He confirmed that in 2009, the 2nd Defendant was still in business and that he had dealt with them for a long time. They kept changing names and directors. He did not attend the auction as he was not aware. He stated that no profit would have accrued to him. On the grains lifespan, his answer was that it depended on the way they are stored but ordinarily would take between 6 – 7 months. The Plaintiff was responsible for the storage and handling charges. Jaffer had guaranteed the Plaintiff that no auction would take place and that he wrote to the 2nd Defendant seeking for more time and it was responded to.
60. He did not ask for more days though the goods were still deposited at the 2nd Defendant's warehouse. The auctioneer sold the goods to recover rent but they were to sell at a good price. He added that from the auctioneer's evidence, the highest bid was 16 million and it was paid by the 4th Defendant where the 3rd Defendant is a director. He averred that Ecobank took all his companies as a result of the auction. He lost over Kshs. 4.2 billion and that he was declared bankrupt. He concluded that he had problems in 2015 and that debts had accrued before. According to PW1, all the cargo belonged to the Plaintiff.
61. Cross examined by Counsel for the 4th Defendant, he stated that he was declared bankrupt in 2017 and that the debt that led to the declaration had arisen in a year he could not remember. A receiver was appointed but did not recall when the bankruptcy was lifted. He denied being a party to the 4th Defendant's name design and that business was his main source of capital. He confirmed that there was no order obtained against the 4th Defendant after the auction. He stated that they sued the 2nd Defendant and not its directors. He concluded that no security was given for the storage charges and that it was only KRA that knew what was due to them.
62. In re-examination, he stated there was no ownership issue between Premier and the Plaintiff since he was a shareholder of both. Referred to pages 63 – 66 of his documents, he stated that there was a tripartite agreement between the Plaintiff, Premier Flour Mills and LDCL. Referred to the Bills of Lading, cargo manifests, import declaration forms, KPA invoices, shippers' invoices and the running account, the witness confirmed that all these documents recognized the Plaintiff as the owner of the cargo. He confirmed that he had dealt with the 2nd Defendant before and that he could be in arrears but would clear.
63. The precaution the Plaintiff took was to take the consignment in bits as it clears the charges. He averred that in 2017, the 2nd Defendant started demanding full clearance of the charges. He denied that no auction took place since the 4th Defendant was related to the 2nd Defendant. On the letter to the 5th Defendant dated 5/6/2017, it was only copied to the 3rd Defendant's law firm and not the Plaintiff. Neither the Plaintiff, LDC nor Ecobank attended the auction.
64. On the newspaper advertisement, the witness stated that the sale price was subject to reserve price. He did not know how the reserve price of USD 160 was arrived at. He stated that cost per tonne was USD 545 but was sold at USD 160 thus incurring losses. He reiterated that the costs were known to the 2nd Defendant. On the directorship of the 2nd and 4th Defendants, the witness stated that there was commonality. He concluded by reiterating the Plaintiff's prayers in the plaint.



65. Martin Esakila Papa was called as PW2. He stated that he was a trained document examiner and a retired chief inspector of police. He prepared a report which he produced as Plaintiff's Exhibit 5.
66. On cross examination by Counsel for the 2nd and 5th Defendants, he stated that he had been instructed by Lime and Njoroge Company Advocates on behalf of the Plaintiff but he did not have any instruction letter. He equally did not have the terms of reference. He was not to confirm if the handwriting was made by the same person. He stated that he had a bundle of six (6) documents. Referred to document marked A3, he stated that there was an overwriting of figure "6" to "7" and it is on the date 12/07/2017.
67. He confirmed that the alteration could not be seen with the naked eyes. On document marked A4, he stated that the dates are "09" and "16". He denied existence of any date of "07" and "09". He did not attach his certificates to the report though he had been paid as a professional. He did not attach any invoice. He stated that he was not testifying because he had been paid. He did not receive any court summons.
68. Cross examined by Counsel for the 3rd Defendant, he answered that the specific instructions received was to confirm if there was any alteration in the documents. It was not possible to see with naked eyes. Only a professional could do. He concluded that he was a trained document examiner.
69. On cross exam by Counsel for the 4th Defendant, he stated that the documents he relied upon were supplied by Limo and Njoroge Advocates having received the same from the Plaintiff.
70. In re-examination, he stated that in his statement, he had stated his qualifications and that if one wanted to confirm, he had the documents with him. He concluded that he stood by the conclusion of his report and that there was no contradictory report. That marked the close of the Plaintiff's case.

Summary of the Defendants' Evidence

71. The 1st Defendant called one witness, William Otieno Odhiambo, its Assistant Manager in the Customs Department. He adopted his witness statement dated 5/7/2023 and produced documents number 1 – 16. He stated that the 1st Defendant was licensed by Commissioner of Customs to handle goods pending customs clearance. It also operated privately as storage facility on behalf of the customs. It handled grains in bulk and they were also licensed to handle fertilizers. He stated that taxes became due once a person lodges its entry. Taxes were paid. He explained in detail what happens after taxes are paid concluding with long room pass which in effect releases the goods if there no pending matters.
72. He explained that customs warehouse rent arises after 21 days from the discharge from the ship. On the consignment in issue, he stated that there was long time prior to release since the cargo came in 2015 but payment was being made in 2016. He did a stoppage to prevent it being released before the rent was paid. The commissioner may waive if an application is made to the Ministry of Treasury and for the case at hand, 70% waiver was approved.
73. The witness stated that the Plaintiff wrote to the commissioner complaining that the goods had been released without it. They went to verify the facts of the allegation and established that the goods had been sold. It then wrote to the 2nd Defendant informing them that there was pending customs rent. The 2nd Defendant responded that only 4,000 Metric Tonnes remained. They reached out to the Plaintiff after getting documents from the 2nd Defendant on how the goods were handled. When its officers went to the Plaintiff's they were chased away and the matter rested there.
74. Referring to exhibit 12, the witness stated that the 2nd Defendant had handled goods without the authority of the commissioner. In his view, the act of auctioning the goods without the commissioner's



- authority offended the law. When it established that the Plaintiff and 2nd Defendant had a side agreement, they withdrew the summons and that the commissioner was not part of the agreement.
75. According to this witness, after payment of duty, the Plaintiff was to have his goods released. For purposes of the auction, the private arrangement applied. He confirmed that there is no loss to it as the 4,000 Metric Tonnes still held is enough to cover the rent. Similarly, goods processed by the 2nd Defendant has a bond which is redeemable. According to the 1st Defendant, it did as per the law and thus should not be part of the dispute. He concluded that the Commissioner did not have any objection to have the goods released after payment of warehouse rent.
76. On cross examination by Counsel for the Plaintiff, the witness stated that the Plaintiff raised a complaint of the irregularity on the way the consignment was dealt with by the 2nd Defendant. He confirmed that when they went to get confirmation from the Plaintiff, they were chased away and that they had gone there as KRA investigators. He confirmed that the said actions were not in his statement. No letter was written to the Plaintiff to demand clarification. He confirmed that the document from the Commissioner superseded other documents from the ranks below him.
77. Referred to the letter dated 3/10/2017, the witness confirmed that KRA wrote to the 2nd Defendant on the Plaintiff's allegations and that the Commissioner had to give clearance before sale. Referred to several letters and Bills of Lading, the witness stated that KRA informed 2nd Defendant of contravention of the law and clearance certificates were therefore sought. He confirmed that the 2nd Defendant did not appear before it for compounding of the offence. He stated that if goods are slated for auctions and an order comes, the order is given priority. He concluded that he was not aware if KRA auctioned the 4,000 Metric Tonnes.
78. On cross examination by Counsel for the 2nd and 5th Defendants, he confirmed that he was part of the people who conducted the investigations into the particular consignment. According to the witness, by the time the Commissioner was receiving the application for waiver, there was 12,000 tonnes. The waiver sought was for 17,000 tonnes and there was non-disclosure that it had received 3,000 tonnes. The witness stated that the sale of 13,196 metric tonnes by way of public auction was an illegality as per the Commissioner's perspective.
79. The Plaintiff did not clear the duty within 21 days and the 2nd Defendant was also entitled to their storage charges which did not involve KRA. He confirmed that the 2nd Defendant did not appear before the Commissioner and that they were to follow up the Plaintiff on the cargo released but they were not receptive. He stated that KRA cannot interfere with private arrangement as long as it does not interfere with its operations. The goods were in the warehouse for more than two (2) years. He confirmed that KRA accepted sale by public auction. He confirmed that by the time waiver was being given, the goods had already been sold by public auction.
80. Cross examined by Counsel for the 3rd Defendant, he stated that the Commissioner seats independently. On cross exam by Counsel for the 4th Defendant, he stated that in compounding of offences, the Commissioner has the option of taking one to court and that if the Commissioner had been informed of the auction, he would have first collected what was there so that the Plaintiff clears with the Commissioner.
81. In re-examination, the witness stated that compounding of offences is a separate arrangement and is like an out of court settlement. Accordingly, the Commissioner was satisfied that some goods were released. The only issue was BL 9 and 10 as they were within the Commissioner's restriction. He stated that if a party applying for waiver over goods not in the warehouse, it would amount to non-disclosure. He



concluded that the Commissioner's role is to enable the clearance of goods where goods were released but not paid and customers can come back for payment.

82. The 3rd Defendant testified through its partner Michael Odhiambo Oloo and he adopted his witness statement dated 29/9/2021. He relied on the 2nd and 5th Defendant's exhibits. On cross examination by the Plaintiff, he confirmed that the instructions to the 5th Defendant were copied to advise on any legal issue arising. He confirmed that he was appointed as non-executive director in the 4th Defendant in 2015 and that at the time the dispute before court arose, he was still a director. As a non-executive director, his role was simply to advise on legal matters and that he did not participate or give instruction on the auction.
83. He confirmed that the company (4th Defendant) was incorporated in 1997 and that it had a minimum of 2 directors. He stated that as a company, it would ordinarily have passed a resolution to participate in the auction. He did not participate in the resolution making to purchase wheat. On his partner Chatur, he stated that she was handling the 2nd Defendant's matter but the law firm was instructed. On the letter to Iseme Kamau Advocates, his response was that he was writing it on behalf of the firm. He confirmed that auction proceeds were sent to the firm.
84. On the letters from the 5th Defendant to 2nd Defendant, he stated that the firm was being copied for purposes of information and that the newspaper advertisement did not mention the reserve price of USD 160 per tonne. On Chatur being a company secretary of Inka Limited, he stated that he was not aware. He did not know the shareholders of the 2nd Defendant but confirmed being its advocate since 2007. He confirmed that the auction took place on 19/7/2017.
85. He charged Kshs. 2,368,898/= as legal fees and he was instructed by the 2nd Defendant to deduct the same from the sale proceeds. The basis of the amount was value of the subject matter. He confirmed having done a lot of correspondences. Total deductions were Kshs. 188,982,300/= leaving a balance of Kshs. 28,492,951/=. The proceeds of auction sale were Kshs. 217,475,251 and they were received around June, 2017. He confirmed that they have always been willing to release the funds but the Plaintiff rejected. He concluded by stating that the funds are still available and if he were to be asked to release, he would do so.
86. On cross examination by 1st Defendant, he confirmed that he was in charge of legal issues and that the Plaintiff had a lot of disputes even in Nairobi High Court. He confirmed that the 1st Defendant was never a party and that the auction was in respect of unclaimed goods.
87. On cross examination by the 2nd and 5th Defendant, he stated that the money was deposited in a client's account and the same was being held in trust. He denied owning any shares in the 4th Defendant and was but a non-executive director with no executive authority. He never instructed anyone on the auction bid and that it was not cast on stone that they were to sit to make resolutions for purchase of goods in the auction. He added that the debtor pays for debt collection and the Plaintiff owed debts. He denied ever acting for the 4th Defendant as an advocate but only sits as a non-executive director.
88. He never attended the auction and knew nothing about it. He could not tell who attended the auction on behalf of the 4th Defendant and that there was nothing wrong in his partner being a company secretary of the 2nd Defendant. He confirmed that the 2nd Defendant and 4th Defendant are two different corporate entities. He concluded that the Plaintiff refused to collect the money and he was served with a demand letter and sued personally.
89. On cross examination by the 4th Defendant, he stated that he did not know the annual returns for the 4th Defendant in 2017.



90. In re- examination, he confirmed that the goods were disposed off under the [Disposal of Uncollected Goods Act](#) and that the legal advice came from his law firm. He reiterated that the procedure was followed and there was no challenge. His client has never made any complaint on the procedure.
91. The 2nd Defendant called Joseph Mwela. He stated that he was an Advocate of the High Court and the 2nd Defendant's head of litigation for the last 14 years. He adopted his statement dated 20/1/2023 as his evidence in chief and produced two sets of documents dated 20/1/2023 and 24/8/2023. He detailed how the 2 vessels arrived, first on 3/6/2014 and the second on 7/3/2016. For the first consignment, they had it for 2 years and the second for 1 year before disposal.
92. He stated that at the time of disposal of the cargo, its value had depreciated since the shelf-life was six months.
93. On cross examination, he stated that he was neither a document examiner, grain assessor, grain staging nor quantification. He clarified that the letters dated 23/9/2016 and 30/2/2016 ought to read year 2017. He confirmed that it was a practice between parties that wheat would be cleared in batches. He stated that the Plaintiff had said that payment would be made tentatively within 14 days and they wrote to the 5th Defendant to call off the auction. The Plaintiff was not copied. Referred to page 180, he stated that the sale was subject to a reserve price. According to him, the reserve price was USD 160 per tonne.
94. He was neither aware of the CIF figures nor that the aggregate value of wheat was USD 506. He denied any relationship between the 2nd and 4th Defendants. He only dealt with the 4th Defendant after the auction. He did not know the total value of grain given to 4th Defendant.
95. On cross examination by the 1st Defendant, the witness stated that it was not a customs control warehouse but a private storage facility. There was an agreement between the Plaintiff and the 2nd Defendant. He confirmed being aware of the Plaintiff's letter to KRA and KRA informing them of the allegations. They wrote back to KRA. According to the witness, the 1st Defendant withdrew its notice upon them being compliant and that to date, they were still handling BL9 and 10. They had no issue with the compounding issue.
96. On cross examination by the 3rd Defendant, he stated that the 3rd Defendant had been in their panel since 2007. It is the firm that was instructed but not Mr. Oloo. Having sought legal advice, the 2nd Defendant settled for [Disposal of Uncollected Goods Act](#). The cargo was still in their custody and no demand had been issued by the 1st Defendant. He denied having issued any instructions as to how the process was to be conducted.
97. He stated that an account was rendered to them and the Plaintiff by the auctioneer, fees and charges itemized and provided but the Plaintiff did not respond. He concluded that discussions between a party and the board chairman is not binding to the company in the absence of resolutions.
98. Cross examined by 4th Defendant, he stated that there were no relations between the 2nd and 4th Defendants. He confirmed that 4,000 MT of wheat were still pending customs released and that no cargo was released prior to the auction. Further, he confirmed that the 4th Defendant had been collecting cargo from the 2nd Defendant even before the auction.
99. On re-examination, he stated that the value of the grains was from the industry practice. Cargo being wheat grains were perishable. He stated that some Bills of Lading had been collected by the Plaintiff. A9 and 10 had not been collected. The witness confirmed that there was a demand letter by the Plaintiff to release wheat stock to Ecobank. They did not hold any goods on behalf of Ecobank, Premier Flour



- Mills or Iseme Kamau Advocates. Referred to documents on directorship of the 2nd and 4th Defendants' he stated that they did not show who the directors were as on 19/6/2017.
100. He concluded that the 5th Defendant came and inspected the goods in their facility both in bulk and in bags and that the 4th Defendant collected the goods from their facility since they also used to handle grains. The witness stated that the 2nd Defendant was not interested in bidding.
 101. The 4th Defendant called Bakari Barayan, its operations manager at the time of the auction. He adopted his statement dated 2/3/2021 as his evidence. He also produced documents numbered 1 – 16 as its exhibits. He stated that the 4th Defendant started milling in the year 2016/17. It started with wheat milling but was also dealing in maize milling. He confirmed attending the auction in 2017 with its CEO, Mr. Muzir. Their bid was successful. He denied knowing the source of the grains but acted on a newspaper advertisement.
 102. He confirmed that they collected about 9,000 MT and are still demanding a balance of 4,000 MT. On board resolution, he stated that they did not need a board resolution for day to day activities and as such, none was needed for the bidding.
 103. Cross examined by the Plaintiff, he did not know that the 4th Defendant had 2 directors. He also did not know that the 2nd Defendant was a director of the 4th Defendant. He joined the 4th Defendant in 2017. He was equally not aware of any business transaction between the 2nd and 4th Defendant before the auction.
 104. Referred to the auction forms, he confirmed that there was wheat movement from the 2nd Defendant and that they used to have business with the 2nd Defendant. In the auction forms, the vessel indicated in Kiran Marmara. He did not know if the 4th Defendant imported grain through Kiran Marmara vessel as at the time and that he was equally not privy to the said vessel's cargo manifest.
 105. He neither produced any Import Declaration Form or Bill of Lading for the 4th Defendant through Kiran Marmara vessel. He did not know what happened before joining the company. Kshs. 100,000/= was paid prior to bidding and the same was paid by the Finance Department since he did not handle money. Referred to the auction advert, he stated that payment was to be in USD, cash or banker's cheque. He confirmed that USD 2,000,000 cannot be carried in cash. He denied having knowledge of the action value in advance but confirmed that an auction took place near Haile Selassie Street.
 106. On cross examination by the 1st Defendant, he stated that the 4th Defendant bought about 13,000 MT of wheat and 4,000 MT has not been delivered due to the court case. He was not aware that 4,000 MT belongs to Customs Department.
 107. Cross examined by the 2nd and 5th Defendant, he stated that at the time of auction, he was not involved in cash since he was then an operations manager. He confirmed being the successful bidder and that wheat can be sold locally and internationally. On the cargo manifest, he stated that there were other millers. He could not tell which importer brought what as per the auction forms.
 108. Cross examined by the 3rd Defendant, he confirmed know the law firm of Oloo and Chatur Advocates and that he knew Mr. Oloo as an advocate but not as a director to the 4th Defendant.
 109. In re-examination, he denied fraudulently preparing for the auction and was not aware of USD 2 million.
 110. The 5th Defendant called Peter Juma Simiyu, an auctioneer trading as Beyond Auctioneers. He adopted his witness statement dated 24/8/2023 as his evidence and also produced documents of even date as his exhibits. He denied receiving any instructions from the 3rd Defendant. Since he knew that the 3rd



- Defendant was working for the 2nd Defendant, letters were being copied to them. He did not know any directors of the 2nd Defendant. Referring to the gazette notice, he stated that there was no order challenging the same.
111. He detailed the whole process culminating in the auction sale on 19/6/2017 where the 4th Defendant emerged as the successful bidder and was then issued with memorandum of sale and a certificate of sale thus passing the title to the goods to it. He confirmed that the money was paid by way of Electronic Funds Transfer (EFT).
 112. On cross examination by the 1st Defendant, he confirmed that he was not instructed by the 1st Defendant. He could not tell what wheat was contained in the Bill of Lading. He later learnt that 4,000 MT were withheld. He had indicated in the advert that the wheat was from Ukraine and Russia, vessel names and the date of arrival. He confirmed that the Commissioner of Custom was not involved in the auction. There were no issues on taxes since he did not know anything to do with customs.
 113. He stated that the debt in issue was in storage and handling charges. It is only later when he learnt of the customs issue. According to him, the 4,000 MT was sold since he was of the opinion that the entire wheat was sold. There was no court order challenging the process.
 114. Cross examined by the Plaintiff, he confirmed being a licensed auctioneer though he did not have the license with him. He stated that he conducted the auction within the *Disposal of Uncollected Goods Act* which he confirmed to be aware of the provisions. According to the witness, two notices ought to issue, notice to collect and notice to sell. It was the witness' position that the Act does not mandate the auctioneer to issue the notices though he confirmed that the notices had been issued. The Kenya Gazette was a notice to sell.
 115. He stated that he was not aware that he was to issue a notice for sale. He confirmed that after the Gazette Notice, he issued a newspaper publication on the auction that was stopped. He also did another advert. He was not aware that the notice was for a minimum of 30 days. He confirmed that the newspaper advert was dated 10/6/2017 and the auction took place on 19/6/2017. He averred that the provisions of the *Auctioneers Act* applied to him and referred to Rule 12 (b) of the Auctioneers Rules, he responded that it did not apply to *Disposal of Uncollected Goods Act*.
 116. He stated that since there was no requirement for proclamation, the Gazette Notice was sufficient. Upon instructions, he did due diligence since he knew the 2nd Defendant's premises were a customs warehouse. He denied knowledge of the 1st Defendant's caveat over 4,000 MT. He also did not establish that there were other persons who lay claim on the wheat. He ascertained the existence of the wheat which was in bags. He did not weigh to confirm that the wheat was 13,000 MT but relied on documentation.
 117. He confirmed that during the testimony, he became aware that 4,000 MT was held by the 1st Defendant and thus not all wheat was collected. On the reserve price, he did not see any valuation of the wheat but only received a letter indicating the reserve price of USD 160 per tonne. He denied knowing the valuation of the wheat as USD 535 per tonne. The witness then gave names of people who attended the auction. On the charge of Kshs. 18 million, he stated that he charged as per the value of sale.
 118. Cross examined by the 4th Defendant, he confirmed that the highest bidder was the 4th Defendant and paid the entire amount in cash transferred to their bank account. He confirmed that when a bidder pays bidding money, he is given a bid number and the catalogue.
 119. In re-examination, he stated that bid numbers could only be given upon fulfilling the conditions indicated in the advert. Money is not receipted since it is refundable. He did not receive instructions



- on how to carry the auction, who to sell to and at what price. He was not aware of any agreement forbidding the sale of goods. His duty was to recover the 2nd Defendant's storage and handling charges and the Plaintiff was to pay them.
120. On the issue of proclamation, he stated that he published a Gazette Notice and that he received close to Kshs. 1 million as bidding deposits. He denied coming from the same village with Michael Wangamati but confirmed coming from the same county. Both Wangamati and Jackson Mungai attended the auction. On the purpose of the reserve price, it was to guide the sale. He denied being aware that the goods were under the 1st Defendant's customs.
121. He was not aware of any third party's interests and that no party came to stop the auction. He concluded that there was no allegation that he lacked a license. That marked the close of the Defendants' cases.
122. Directions were taken that the parties do file their closing submissions. All parties duly complied by filing submissions and cited various authorities in support of their rival positions.

Summary of the Plaintiff's Submissions

123. They are dated 25th July, 2024. The Plaintiff proposed six (6) issues for determination. They are as follows: -
- a. Illegal auctioning by the 2nd, 3rd, 4th and 5th Defendants' of the Plaintiff's 13,196.3138 metric tonnes of wheat contrary to mandatory provisions of law, East African Community Customs Management Act, 2004;
 - b. The legal verity of the Defendants' Defences – *Ex-turpi causa non oritur actio*;
 - c. The apparent collusion, conspiracy and conflict of interest of the 2nd, 3rd, 4th and 5th Defendants in dealing and illegal disposal of the Plaintiff's Metric Tonnes of wheat;
 - d. Estoppel against disposal of the Plaintiff's 13,196.3138 Metric Tonnes of wheat as at June, 2017;
 - e. Illegality of the purported auction; and
 - f. Disposal of the Plaintiff's wheat in contravention of orders of court.
124. The Plaintiff opted to argue the first two (2) issues together. It submitted that the 1st Defendant's witness on cross examination confirmed that the entire wheat stock belonging to the Plaintiff and stored by the 2nd Defendant was under customs control. It made reference to sections 34 (5) and 16 (1) (a) of the EACCMA to buttress the point that it mattered not that all the taxes and duties relating to the wheat stock had been duly paid.
125. To the extent that warehouse rent was pending settlement, the Plaintiff's residual wheat stock stored by the 2nd Defendant was under customs control and could not be interfered with without express permission of the 1st Defendant. It dismissed the 2nd and 3rd Defendant's arguments on this ground and cited section 16 (2) (b) of the EACCMA and the definition of interference under the Black's Law Dictionary.
126. According to the Plaintiff, the Defendants' actions in disposing off the residual wheat through public auction amounted to interference. It made reference to the letters dated 3rd July, 2017, its letter dated 26th September, 2017 and the 1st Defendant's letters dated 3rd October, 2017 and 14th November, 2018. It thus concludes that the Defendants' actions were illegal and contravened the express and mandatory



- provisions of section 16 (2) (b) of the EACCMA. The Plaintiff asserts that as per section 16 (4) of the EACCMA, what the Defendants did was not only illegal but also a criminal offence.
127. On the doctrine of Ex turpi causa non oritur actio (no man shall found a claim or defence on transgression of the law), the Plaintiff posited that it is a settled position of law that no court shall lend a hand in facilitation of an illegal act. The Plaintiff cited several authorities among them *Holman v Johnson* (1705 – 1802) Ell ER applied in *Standard Chartered v Intercom Services Limited & 4 Others*, Civil Appeal No. 37 of 2003 and *Heptulla v Noormohamed* [1984] eKLR.
 128. In breaking it down, the Plaintiff urges the court to disregard the 2nd Defendant's defence placing reliance on the public auction of 19th June, 2017. According to the Plaintiff, if the court were to acknowledge the said public auction as a defence, the court shall be lending its hand to aid an illegality. Secondly, it is the Plaintiff's position that the 4th Defendant cannot be said to have obtained good title in the 13,196.3138 Metric Tonnes from the public auction conducted on 19th June, 2017.
 129. The Plaintiff posits that the sale having been contrary to section 16 (4) of the EACCMA, the 2nd to 5th Defendants have no defence to the Plaintiff's claim. It is thus its view that it is entitled to compensation and accordingly, if prayer (a) is grantable, consequential prayers set out in the plaint are equally grantable.
 130. Without prejudice to the first prayer, the Plaintiff then contends that there was apparent collusion, conspiracy and conflict of interest of the 2nd to 5th Defendants in dealing and illegal disposal of the Plaintiff's 13,196.3138 Metric Tonnes of wheat. Under this head, the Plaintiff seeks to set out the relationship between the 2nd to 4th Defendants. The Plaintiff has referred the court to Plaintiff's exhibit B and in particular, B9, B22, B24, B25, B27, B28, B29, B30, B31 and B32 to conclude that the totality of the interwoven, legal and business relationship and co-related existence of the 2nd, 3rd and 4th Defendants, the 2nd and 4th Defendants exists as holding companies and indisputably have a business relationship.
 131. The Plaintiff submits that the relationship of the 2nd, 3rd and 4th Defendants was not disclosed to the participating bidders before the auction yet the said parties were under a constitutional duty to do so under Article 10 of *the Constitution* of Kenya. It goes ahead to demonstrate instances of collusion among them appropriation of the Plaintiff's wheat before the date of the alleged auction. According to the Plaintiff, the 2nd Defendant begun to take away the Plaintiff's wheat before the auction date of 19th June, 2017. To support this position, the Plaintiff refers to a letter dated 28th March, 2018 and asserts that 2,000 Metric Tonnes were delivered to the 4th Defendant on 23rd September, 2016.
 132. The Plaintiff pours cold water on the 2nd Defendant's witness testimony in orally correcting the information in the letter dated 28th March, 2018. It cites the Court of Appeal decision in *Fidelity Commercial Bank Limited v Kenya Grange Vehicle Industries Limited* [2017] eKLR on the issue of parole evidence rule.
 133. To buttress this issue, the Plaintiff further placed reliance on the 4th Defendant's outward cargo movement forms to show that on 13th, 14th and 15th June, 2017 the 4th Defendant collected some wheat consignment from the 2nd Defendant that were formerly aboard MV Kiran Marmara using several motor vehicles.
 134. According to PW2, some entries were altered or overwritten on the date entries. Reference was made to a forensic Examination Report dated 18th May, 2023 (Plaintiff Exhibit E). The Plaintiff asserts that the Defendants did not avail a witness to challenge PW2's findings. The Court of Appeal decision in



Criticos v National Bank of Kenya (as the successor in Business to Kenya National Capital Corporation Limited “KENYAC”) & Another (Civil Appeal 80 of 2017) [2022] KECA 541.

135. Secondly, the Plaintiff submits that there was collusion to give undue and illegal advantage to the 4th Defendant in the mocked up auction. The actions of the 2nd Defendant to issue instructions to the 3rd Defendant to instruct the 5th Defendant to auction the Plaintiff’s wheat to the 4th Defendant have been called to sharp focus to support this issue. The Plaintiff’s position that the price of USD 160 per tonne was made known to the 4th Defendant through its director, the 3rd Defendant way before the alleged auction of 19th July, 2017. To support this position, the 5th Defendant’s letter to the 2nd Defendant and copied to the 3rd Defendant dated 22nd May, 2017 is said to be the evidence of undue and illegal advantage.
136. Thirdly, it is submitted for the Plaintiff that there was collusion to conduct a mock sale of the Plaintiff’s wheat to the 4th Defendant to launder the illegal disposition of wheat. To this, the Plaintiff points out that the 2nd Defendant had already begun passing the Plaintiff’s wheat comprised in the 13,196.3138 metric tonnes way before the alleged auction date of 19th June, 2017.
137. Next, the Plaintiff asserts that the Plaintiff’s wheat was disposed in violation of court orders. It is said that the 2nd Defendant went to lengths of violating court orders and being at risk of sanction of contempt of court orders but still disposed the subject wheat to the 4th Defendant.
138. It is also submitted that there was contravention of section 7 (4) of the *Disposal of Uncollected Goods Act* in terms of giving an account to the depositor for the proceeds of sale. The Plaintiff points out than other than selling the wheat at a massive undervalue, the difference after costs have not been remitted to the Plaintiff to date.
139. The Plaintiff then submits on estoppel against disposal of its wheat as at June, 2017. It makes reference to the letter dated 19th May, 2017 where the Plaintiff sought the 2nd Defendant’s indulgence not to proceed with the intended auction. It posits that the 2nd Defendant agreed to halt the intended auction process to allow the Plaintiff sort out its finances. According to the Plaintiff, this amounted to a promissory estoppel against the 2nd Defendant. Reliance was placed on the case of Carol Construction Engineers Limited & Another v National Bank of Kenya [2020] eKLR where the case of Central London Property Trust Ltd v High Trees House Ltd (1947) K-B 130 (1946) (The “High Trees Case”) was cited approval.
140. On illegality and irregularity of the purported auction, the Plaintiff has posed several questions among them whether there was an auction in the first place. Making reference to Rule 17 (5) of the Auctioneers Rules, 2009, it is the Plaintiff’s position is that some of the bidders listed did not participate in the alleged auction. Since it was the Defendants’ assertion that an auction took place, the Plaintiff asserts the provisions of section 109 of the *Evidence Act* on the maxim that he who alleges must prove. Further, the Court of Appeal decision in Ndiritu v Ropkoi & Another [2005] 1 EA 334 was cited.
141. Section 112 of the *Evidence Act* has also been invoked. This was applied in the case of Kenya Akiba Micro Financing Limited v Ezekiel Chebii & 4 Others [2012] eKLR. According to the Plaintiff, it was the 2nd, 4th and 5th Defendants’ obligation to prove that the existence of the auction.
142. On whether there were 13,196.3138 Metric Tonnes of the Plaintiff’s wheat capable of auction as at 19th June, 2017, the Plaintiff in answer has referred to the letters dated 3rd October, 2017, 5th October, 2017 and 28th March, 2018. It has referred to Bills of Lading 5, 6, 8, 11 and 12 that were fully delivered on 4th July, 2016, 5th December, 2016 and 30th December, 2016. Bill of Lading No. 7 amounting to 2,000 MT were fully delivered to the 4th Defendant while B/L No. 9 and 10 amounting to 4,000 MT



were still in the 2nd Defendant's custody as of the date of the letter dated 28th March, 2018. Therefore, the Plaintiff concludes that there were no 13,196.3138 MT capable of auction on 19th June, 2017.

143. On the legality of the auction, the Plaintiff begins by submitting that the 5th Defendant did not have a valid license to conduct auctioneering business. It refers to section 9 of the *Auctioneers Act* and Rule 3 (1) of the Rules thereunder. According to the Plaintiff, the 5th Defendant did not produce a copy of his license in court. It cited the case of *Duncan Mwangovya v Meena Bhagwandas Patel* [2008] eKLR to impeach the auction sale on 19th June, 2017.
144. On the issue of failure to issue a proclamation/attachment of the Plaintiff's wheat subject of the public auction, the Plaintiff submits that under the *Disposal of Uncollected Goods Act*, a sale under this Act does not contemplate involvement of an auctioneer in the exercise of the right to sell by a custodian. Section 7 (1) of the Act is produced in extenso. However, where the custodian opts to involve an auctioneer, the auctioneer is bound by the *Auctioneers Act* and the Rules. Reference has been had on section 23 (b) of the Act and Rule 6, 12 (b) and (c) of the Rules thereunder.
145. The decisions in *Lakeland Motors Limited v Harbhajan Singh Sembi*, Civil Application No. Nai. 24 of 1998 (11/98UR) [1998] eKLR as well as *Hughes Limited v Mohammed S Kassam* [2008] eKLR were cited in support. The Plaintiff further submit that there was neither legal notice to take delivery nor notice of intention issued. Similarly, the Plaintiff submits that the best price reasonable was not obtained in the circumstances.
146. In totality, the Plaintiff urged the court to grant the prayers sought in the plaint dated 28th October, 2020.

Summary of the 1st Defendant's Submissions

147. They are dated 24th September, 2024. It has delineated three (3) issues for determination which are: -
 - a. Whether the Plaintiff's wheat under BL 5, 6, 7, 8, 9, 10, 11 and 12 was under customs control within the meaning of section 16 (1) East Africa Community Customs Management (EACCMA), 2004;
 - b. Whether liability attaches to the 1st Defendant officers where goods deemed to have been deposited in a customs warehouse are lost or damaged pursuant to section 43 (2) of EACCMA, 2004; and
 - c. Whether the Plaintiff discharged its burden of proof and is entitled to the reliefs sought as against the 1st Defendant.
148. The 1st Defendant submits that the 2nd Defendant is both a private and public storage facility and in this particular case, the Plaintiff on its own volition chose to store the goods with it under certain terms and conditions which the 1st Defendant was not privy to. It follows that the Plaintiff and the 2nd Defendant had entered a contractual relation with its own implications. The Court of Appeal decisions in *National Bank of Kenya v Pipeplastic Samkolit (K) Ltd & Another* [2001] eKLR and *Pius Kimaiyo Langat v Co-operative Bank of Kenya Ltd* [2017] eKLR on the role of courts in matters contract were referred.
149. Accordingly, the contract for storage and charges thereon was strictly between the Plaintiff and the 2nd Defendant, not with the 1st Defendant. It cited the case of *Savings & Loans (K) Limited v Kanyenje Karangaita Gakombe & Another* [2015] eKLR which relied on other authorities in submitting that a contract affects only parties to it and that it cannot be enforced by or against a non-party.



150. On the first issue, the 1st Defendant submits that the only goods it had actual or beneficial interest were those in BL No. 9 covering 2,000 MT and BL No. 10 covering 2,000 MT as they were still under the custody of the 2nd Defendant covered by F89 No. 208429 and F89 No. 208430 placed on 20th February, 2017. It submits that the Plaintiff's wheat under BL 5, 6, 7, 8, 11 and 12 were not under customs control as envisaged by section 16 (1) of EACCMA, 2004. It stated how goods are ascertained whether they goods deposited in a custom warehouse.
151. Making reference to its witness statement at paragraph 3, BL 5, 6, 7, 8, 9, 10, 11 and 12 all had Long Room Pass meaning the cargo was ready for collection and the exception was BL 9 and 10 which though had Long Room Pass, there was an F89 (restriction) placed on them since there was non-compliance with payment of customs warehouse rent only. Therefore, according to the 1st Defendant, the only goods under customs control were 4,000 MT covered by BL 9 and BL 10. The 1st Defendant reproduced the provisions of section 16 (1) of the EACCMA in extenso.
152. Contradicting the Plaintiff's evidence, the 1st Defendant submits that the allegation that BL 5, 6, 7, 8, 9, 10, 11 and 12 had been dealt with contrary to section 16 (2) of EACCMA was not supported by evidence since the only exceptions were BL 9 and 10. To date, the 1st Defendant posits that this consignment is deemed still under customs control and as per the testimony of its witness, the 2nd Defendant regularly executes a bond with the Commissioner to cater for any omission or non-compliance.
153. The 1st Defendant states that when it carried out its investigations, it received a detailed explanation from the 2nd Defendant and being satisfied, it directed that the 4,000 MT which had F89 placed on them be transferred to customs warehouse to be slotted for next auction to cover pending customs warehouse rent owed to the Government. In conclusion, the 1st Defendant submits that no consignment was dealt with contrary to section 16 (2) of EACCMA, 2004.
154. Placing reliance in the High Court case in Ahmed Kuliye Bin & 2 Others v Kenya Revenue Authority & Another [2024] eKLR, it submits that it is not liable for any loss occasioned to the Plaintiff. It also cited the case of Kenya Revenue Authority v Doshi Iron Mongers & Another which observed that the purpose of F89 is to seize the goods which are still in custody of the authority pending further action. This seizure brings the goods within the customs control and as such, cannot be dealt without the authority of the Commissioner of Customs and Border Control.
155. The case of Crywan Enterprises Ltd v Kenya Revenue Authority was relied upon for the powers of KRA to keep goods in safe custody until duties were paid. According to the 1st Defendant, the Plaintiff did not specify which consignment in terms of BL No. was sold and as confirmed by the 5th Defendant, the goods sold were not ascertainable since the Plaintiff had been storing its various consignment of imported wheat with the 2nd Defendant even before the wheat subject of the suit.
156. The 1st Defendant submits that the subject wheat upon delivery to the custody of the 2nd Defendant, they are deemed to have been delivered for home consumption as they were not for export. A reproduction of the provisions of section 50 (1) (2) of EACCMA, 2004 is then made.
157. On the second issue, the 1st Defendant once again makes reference to Form 89 or F89 and confirms that BL 5, 6, 7, 8, 9, 10, 11 and 12 all had Long Room Pass meaning the cargo was ready for collection except for BL 9 and 10 since there was non-compliance with payment of warehouse rent only.
158. On the third issue, the 1st Defendant cited the case of Hellen Wangari Wangechi v Carumera Muthini Gathua [2005] eKLR where Mativo, J (as he then was) discussed the burden of proof in detail. On the first prayer seeking a declaration that the sale of 13,196.3138 was illegal for want of authority and



approval, the 1st Defendant submits that no evidence was tendered in court to clearly demonstrate that there was want of authority and approval from the 1st Defendant.

159. On the prayer seeking a declaration that auction was marred with irregularities, fraud and conflict of interest, it submits that no particulars of illegality were proved against it as the consignment and BL which was subject of the auction were not covered by any F89 and not under customs control On the prayer that the auction done on 19th June, 2017 was done contrary to a court order issued on 12th May, 2017 in Nairobi HCCC No. 195 of 2017, the Defendant submits that it was not a party to the suit and the Plaintiff did not demonstrate that the said order was brought to the attention of the 1st Defendant.
160. On the issue of the 4th Defendant not being an innocent purchaser, it is the 1st Defendant's position that the prayer is not against it. On the prayer for a sum of Kshs. 730,292,207.28/=, the 1st Defendant citing several authorities among them Capital Fish Kenya Limited v The Kenya Power & Lighting Company [2016] eKLR on the issue of special damages. According to the 1st Defendant, the Plaintiff did not discharge the burden to prove how it arrived at the figure for instance, it did not demonstrate whether there was an order for its cargo from any trader, price quoted or the tonnage ordered to enable the court clearly see the tabulation.
161. Accordingly, presentation of custom documents with FOB values amounted to the Plaintiff throwing pieces of paper to court to imagine and come up with a figure and thereafter award the Plaintiff the sum. On loss of anticipated profits, it was submitted that there was no demonstration how the loss was arrived at noting that it had other pending litigation with other parties to the exclusion of the 1st Defendant. It thus concluded that the Plaintiff's suit dated 28th October, 2020 be dismissed with costs.

Summary of the 2nd and 5th Defendants' Submissions

162. They are dated 25th September, 2024. They have identified seven (7) issues for determination. They are as follows: -
- a. Whether the consignment auctioned and sold consisted of goods under customs control which could not be disposed of without the consent and or authority of KRA;
 - b. Whether there was any conflict of interests, collusion and or role the 3rd Defendant played in the auction;
 - c. Whether a proclamation and notice of redemption under the Auctioneers Rules, 1997 applied to the auction and if so, whether there was compliance and the tenor and effect of any such non-compliance;
 - d. Whether there was breach of the orders issued in the Ecobank's case in the auction;
 - e. Whether the auction was subject to the value of Kshs. 730,292,207.28/=;
 - f. Whether the Plaintiff is entitled to the prayers sought; and
 - g. Whether the 4th Defendant is entitled to the relief as sought in the Notice of Cross Claim filed on 26th May, 2021.
163. The 2nd and 5th Defendants begin by submitting on burden of proof citing section 107 of the [Evidence Act](#) and the decision in Ann Wambui Nderitu v Joseph Kiprono Ropkoi & Another [2004] eKLR among other authorities.
164. On the first issue, the 2nd and 5th Defendants citing section 16 (1) (a) of the EACCMA submit that the provision applies to all goods imported to the territory of Kenya and categorically outlines the



period of customs control of imported goods being from importation until they are delivered for home consumption. They submit that custom duties having been paid made the goods no longer under customs control having been released for home consumption.

165. They state that the Plaintiff's sole claim that its consignment was under customs control is pegged on the assertion that customs warehouse rent had not been paid on the subject consignment. They submit on when customs warehouse rent is deemed due and payable. They refer to section 34 (5) of the EACCMA on the number of days after which goods become liable to customs warehouse rent and Regulation 84 (1) of the EACCM Regulations, 2010. As such, they state that the first point of entry in the context of the consignment herein was the Port of Mombasa.
166. They add that the 2nd Defendant's premises are only gazetted as custom area in terms of section 12 (a) as a transit shed. As such, the 2nd Defendant's premises are not subject to customs warehouse rent. They conclude that the Plaintiff's claim is premised on unfounded facts and a complete misinterpretation of the EACCMA purely aimed at marring the lawful and regular auction of the Plaintiff's consignment by the 2nd Defendant.
167. They submit that the Plaintiff's arguments and submissions are tantamount to inviting the court to enter the realm of legislation to expand the meaning of "goods under custom control." The decisions in *Apollo Mboya v Attorney General & 2 Others* [2018] eKLR and *Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others* [2012] eKLR have been cited.
168. On the relationship between the Plaintiff and the 2nd Defendant, they submit that they entered into a private arrangement post customs clearance for storage and handling of consignment in exchange for agreed upon consideration. Upon the Plaintiff default in paying storage and handling charges, the 2nd Defendant resorted to dispose of the Plaintiff's goods in order to recover its charges and to make for the loss of business occasioned to it. It disposed of the consignment pursuant to the [*Disposal of Uncollected Goods Act*](#). Section 7 of the said Act has been reproduced.
169. From the said section, they submit that the sale is as against the depositor and not any other person. According to the 2nd Defendant, there was a private arrangement between the Plaintiff and itself on storage and handling charges outside the control and authority of the 1st Defendant. Accordingly, auction did not therefore affect or interfere with the 1st Defendant's claims and rights over the auctioned portion. The auction only affected the Plaintiff's rights and claims over the auctioned portion. They rely on section 130 of the EACCMA.
170. On the second issue, they urge the court to dismiss the allegations of conflict for several reasons. First, it is submitted that the claim for common shareholding and directorship impugns the fundamental concept of legal corporations as enunciated in *Salmon v Salmon* [1897] AC 78 reiterated in *Francis George Hill Family Trust v South African Reserved Bank & Others* 1992 (3) SA 91 (A) at 97B – G and accepted in Kenya in several decisions including *Nextgen Office Suites Ltd & Another v Netcom Investments Ltd & Another*; *Shah Minakshi Navichandra (Interested Party)* [2021] eKLR.
171. Secondly, as a distinct and separate entities, the management, control and operations of the 2nd and 4th Defendants are entrusted on their distinct and separate directors and management systems. Accordingly, it is their contention that no evidence to prove commonality of directors of the two entities was adduced.
172. Thirdly, there was no evidence of any meeting between shareholders of the 2nd, 3rd and 4th Defendants acting in concert on any dealings relating to the Plaintiff's consignment. The cases of *Vijay Morjaria v Nansingh Madhusingh Darbar & Another* [2000] eKLR and *Ardhi Highway Developers Limited v West End Butchery Limited & 6 Others* [2015] eKLR were cited on the issue of fraud.



173. On the third issue, they submit that the issue in dispute was the disposal of the Plaintiff's consignment under the provisions of *Disposal of Uncollected Goods Act*. Making reference to the provisions of sections 4, 5,6 and 7 of the said Act, they do not envisage the involvement of an auctioneer in the disposal. Therefore, the 2nd Defendant's engagement of the 5th Defendant was thus out of caution and not a requirement.
174. They dismiss reliance on the *Auctioneers Act*, the *Land Act* and the Transfer of Property Act as inapplicable under the *Disposal of Uncollected Goods Act*. They cited the case of Sammy Ndung'u Waity v Independent Electoral & Boundaries Commission & 3 Others [2019] eKLR. Further, they rely on the case of Isaac Oluoch Polo Aluochier v IEBC & 17 Others.
175. On the fourth issue, they contend that PW1 admitted that neither itself nor the parties in the Ecobank case took any further steps to prosecute the 2nd and the 5th Defendants for any contempt of the said orders. Accordingly, no such orders existed and even if they did, they were not applicable to them.
176. On the applicable value of the Plaintiff's consignment, they reiterated the position that the disposal was under the *Disposal of Uncollected Goods Act* and not the *Auctioneers Act* or the Rules thereunder. The 2nd Defendant merely nominated the 5th Defendant to undertake disposal on its behalf. On section 7(2) of the *Disposal of Uncollected Goods Act*, it is submitted that a custodian invoking a disposal under the Act is merely to ensure the sale obtain the best price reasonable in the circumstances and not the market price. They conclude that the Plaintiff's case be dismissed with costs.

Summary of 3rd Defendant's Submissions

177. They are dated 20th September, 2024. The following issues were identified: -
- a. Whether the 3rd Defendant breached its duty and or trust bestowed upon it by the 2nd Defendant/Client;
 - b. Whether in the course of carrying out its professional duties, the 3rd Defendant and specifically Mr. Michael Odhiambo Oloo was conflicted and guilty of misconduct;
 - c. Whether the mode of disposal through *Disposal of Uncollected Goods Act* (DUGA) pursuant to the advice tendered to the 2nd Defendant by the 3rd Respondent was procedural and lawful in the circumstances; and
 - d. Whether the 3rd Defendant did cause the disposal of the subject goods to the 4th Defendant through either collusion and or fraud as alleged or at all.
178. On the first issue, it is submitted that at all times, the 3rd Defendant is/was a partner in the firm of Oloo & Chatur Advocates and a practicing advocate of good standing. It is stated that it is a client's wishes that govern the conduct of the matter as the lawyer is a mere agent and generally the one responsible for deciding on the means to achieve a client's objectives and as such, matters of legal strategy are within the purview of the lawyer subject to consultation with client.
179. In the case at hand, it is submitted that the 2nd Defendant/Client desired to recover from the Plaintiff accrued storage charges amounting to USD 2,036,987.35 and sought legal advice from the 3rd Defendant's firm of advocates who were on their panel and the advocates recommended disposal under DUGA as the best mode for the 2nd Defendant. The 2nd Defendant's witness confirmed to court that the client was satisfied with the advice and conduct of the 3rd Defendant's firm of advocates at all material times to the transaction.



180. On the second issue, the case of David M. Mereka T/A Mereka & Co. Advocates v County Government of Nairobi [2021] eKLR was cited on the issue of conflict of interest and client confidentiality. Among other grounds, it was submitted that the 3rd Defendant did not direct the 5th Defendant on how and or whom to sell the subject goods at the auction or at what price for that matter.
181. On the third and fourth and issues, the 3rd Defendant submitted in detail that the disposal of goods pursuant to the provisions of DUGA by the 5th Defendant acting on the advice of the 3rd Defendant pursuant to instructions received from the 2nd Defendant was lawful and procedurally effected and that the same was devoid of any collusion or fraud as alleged. The 3rd Defendant referred to the provisions of section 3 (i) (c), 5, 6, 7 (2) and (4) of DUGA in demonstrating compliance before disposal. He also cited the case of NIC Bank Limited v General Motors East Africa Limited & Another [2014] eKLR.
182. On the allegations of fraud, it cited several cases among them Koinange & 13 Others v Charles Karuga Koinange [1986] eKLR to posit that the allegations of fraud pleaded against him were a farce and did not meet the threshold set down under the law. In totality, he prayed that the suit against him be dismissed with costs.

Summary of the 4th Defendant's Submissions

183. They are dated 18th September, 2024. It submitted that it is a going concern engaged in grain milling, distribution and related business since inception to date and it is a distinct legal person under company law independent from both the 2nd and 3rd Defendant. The case of Jepkemoi v Zaburi Enterprises Company Ltd & 2 Others (Miscellaneous Civil Application 43 of 2023) [2024] KEHC 2343 (KLR) (8 March, 2024) (Ruling) was relied upon.
184. It is the 4th Defendant's position that the 3rd Defendant was only a nominal director to the 4th Defendant. He referred to the definition of a nominal director by Patrick J. O'Malley in his book "Directors' Duties and Corporate Anti-Corruption Compliance." As such, being a nominal director at the 4th Defendant, there was no way there was collusion between him and the 4th Defendant purposely to divest the Plaintiff its wheat. It then reiterated how it acquired the wheat in issue and then concludes with its claim against the 2nd Defendant.
185. In conclusion, it sought that the claim against it by the Plaintiff be dismissed and conversely, an order for release of 4,113.2 MT of wheat do issue against the 2nd Defendant with costs.

Analysis and Determination

186. I have considered the parties' pleadings, the evidence on record both oral and documentary, parties' detailed submissions, the authorities cited as well as the law, and accordingly the following issues fall for determination: -
- a. Whether the Plaintiff's wheat was under customs control within the meaning of section 16 (1) of the East African Community Customs Management Act, 2004;
 - b. Whether the Auctioneers Act and Rules thereunder was the applicable law;
 - c. Whether there was any collusion, conspiracy and conflict of interest between the 2nd to 5th Defendants;
 - d. Whether fraud was proved to the required standard;
 - e. If the answer to (c) and (d) above are in the affirmative, whether the public auction of 19th June, 2017 was conducted legally;



- f. Whether the Plaintiff is entitled to the reliefs sought;
- g. Whether the 4th Defendant's Notice of Cross Claim is merited; and
- h. Who bears the costs?

187. Before dissecting the issues above, there are certain facts not in dispute. There is no contest that between 3rd June, 2014 and 6th March, 2016, the Plaintiff received 29,500 Metric Tonnes of Russian and Ukrainian wheat. The wheat was taken to the 2nd Defendant's warehouse upon taxes being paid to the 1st Defendant. It is also not in dispute that the Plaintiff took some of the consignment leaving a balance of 13,196.3136. However, due to failure to pay the 2nd Defendant's storage and handling charges, the remaining consignment was sold by way of public auction to recover the 2nd Defendant's storage and handling charges

188. Turning to the first issue, the answer is found at section 16 (1) of EACCMA which provides as follows:
-

16 (1) The following goods shall be subject to Customs control—

- a. imported goods, including goods imported through the Post Office, from the time of importation until delivery for home consumption or until exportation, whichever first happens;
- b. goods under duty drawback from the time of the claim for duty drawback until exportation;
- c. goods subject to any export duty from the time when the goods are brought to any port or place for exportation until exportation
- d. goods subject to any restriction on exportation from the time the goods are brought to any port or place for exportation until exportation;
- e. goods which are with the permission of the proper officer stored in a Customs area pending exportation;
- f. goods on board any aircraft or vessel whilst within any part or place in a Partner State;
- g. imported goods subject to duty where there is a change of ownership over such goods from an exempt person to a non-exempt person;
- h. goods which have been declared for or are intended for transfer to another Partner State;
- i. seized goods.

189. My understanding of this provision is that the term “delivery for home consumption” is at the point the duty has been paid. This provision must be read together with section 120 (3) of the EACCMA which provides as follows: -

Where goods are entered in accordance with section 34 before the arrival at the port of discharge of the aircraft or vessel in which such goods are imported, the import duty upon the goods shall be paid at the rate in force at the time of arrival of such aircraft or vessel at such port of discharge.



190. At paragraphs 17 and 18 of the plaint, the Plaintiff averred that it was under a statutory duty to pay custom warehouse rent to the 1st Defendant and storage charges to the 2nd Defendant and which it had fell in arrears. As regards the issue with custom warehouse rent, section 34 (5) of EACMMA clearly provides how the same arises. It states as follows: -

“Where goods entered in accordance with subsection (1) are not removed from the first point of entry within fourteen days from the date of entry, such goods shall be liable to custom warehouse rent.”

191. For the Plaintiff to invoke the provisions of section 16 (2) (b), it ought to have shown that the entire consignment of 29,500 Metric Tonnes of wheat had been interfered with. However, this is not the position because as at the time it fell into arrears, it had already collected over 50% of the consignment leaving a balance of 13,196.3136 Metric Tonnes of wheat. Was the entire consignment of 13,196.3136 Metric Tonnes subject to customs control? The answer must be in the negative.

192. I say so for the following reason; the 1st Defendant’s witness confirmed that Bills of Lading 5, 6, 7, 8, 9, 10, 10, 11 and 12 all had Long Room Pass but the exceptions were BL 9 and 10 since F89 (restriction) had been placed on them because of non-payment of customs warehouse rent. These two Bills of Lading contained 2,000 Metric Tonnes each adding up to 4,000 Metric Tonnes in total. Further confirmation is found at pages 11, 12A and 13A of the 1st Defendant’s Exhibits.

193. To this end, I am satisfied that the Plaintiff’s consignment of wheat was not under custom control other than BL 9 and 10 since they were covered by F89 No. 208429 and F89 No. 208430 placed on 20th February, 2017. At page 13D, there is letter from the 2nd Defendant dated 6th February, 2019 addressed to the 1st Defendant’s Chief Manager. In the said letter, the 2nd Defendant confirms holding 4,000 MT of the consignment in their custody and only awaiting the 1st Defendant’s necessary action. It concludes by saying “We have no objection for the same being dispose as the commissioner may deem fit.”

194. I note that at page 93 of the Plaintiff’s exhibit, there is a letter from the 1st Defendant addressed to the 2nd Defendant dated 3rd October, 2017. The Bills of Lading indicated therein are the same ones which the 1st Respondent acknowledges to have confirmed were properly addressed through the letter dated 14th November, 2018. I thus find that the earlier letter of 3rd October, 2017 was overtaken by events.

195. On the first issue, I thus return a finding that the Plaintiff’s consignment of wheat was not goods subject to customs control within the meaning of section 16 (1) of the East African Community Customs Management Act, 2004.

196. On the second issue, the Plaintiff at paragraph 39 of the plaint averred that the auctioneer did not proclaim the goods before selling contrary to Rule 12 of the Auctioneers Rules, 1997 and that he did not issue the Plaintiff with notice of redemption contrary to Rule 12 of the Auctioneers Rules, 1997. The Plaintiff made lengthy submissions on the issue of notices and the 2nd and 5th Defendants responded in equal measure. According to the Plaintiff, no proclamation/attachment of the Plaintiff’s wheat was done prior to the public auction. On its part, the 2nd, 3rd and 5th Defendants assert that they proceeded under DUGA.

197. This being the case, it is the duty of this court to resolve the impasse. In the Plaintiff bundle of documents, there are two letters by the 2nd Defendant dated 8th November, 2016 and 28th March, 2017. They are demanding from the Plaintiff payment of some outstanding money failure to which they would proceed to dispose off the goods in their possession. A reading of the two (2) letters leave no



doubt in my mind that the Defendant was proceeding under the provisions of Disposal of Uncollected Goods Act (DUGA).

198. The long title to this Act is as follows: -

“An Act of Parliament to provide for the disposal of goods deposited under certain contracts but not re-delivered; and for connected purposes.”

199. On the other hand, the long title to the Auctioneers Act reads as follows: -

“An Act of Parliament to consolidate and amend the law relating to auctioneers, to provide for the licensing and regulations of the business and practice of auctioneers, and for connected purposes.”

200. The case in issue concerned recovery of accrued storage and handling charges and since the 2nd Defendant was holding a contractual lien over the Plaintiff's consignment, there is no doubt that the most appropriate statute to invoke in such a scenario is DUGA. All a party requires is to bring itself within the provisions of section 3 of DUGA. It provides as follows: -

- 1) This Act shall apply to goods in the possession or under the control of a custodian under a contract—
 - (a) to repair, treat or work on the goods;
 - (b) to value, survey or give an estimate relating to the goods;
 - (c) for custody or warehousing of the goods for reward;
 - (d) for carriage of the goods;
 - (e) for hire of the goods;
 - (f) for gratuitous deposit or gratuitous loan of the goods;
 - (g) for pawn of the goods, or under any other contract of bailment, express or implied:
Provided that the application of the Act may be expressly modified or excluded by the terms of the contract. (Emphasis Added)

201. In Kenyan legal practice, when a law dictates a specific procedure, it should be followed. courts have consistently emphasized the importance of upholding the law and its procedures. Therefore, for a party to impeach the application of DUGA in the scenario such as the present one, he or she ought to show that the requisite notices under the Act were not issued or served. There are two notices under the Act. These are notice to take delivery and notice to sell.

202. Looking at the two (2) letters under reference, save for the number of days, I find that they are sufficient notice since the first letter was issued in November, 2016 and the next letter in March, 2017 which I find to be more than thirty (30) in terms of the first schedule to the Act. At page 79 of the bundle, there is a gazette notice dated 12th April, 2017 and published on 21st April, 2017. It clearly issued a notice to the Plaintiff. The initial auction sale was to take place on 22nd May, 2017 as evidenced by the 5th Defendant's Daily Nation extract of 13th May, 2017. This date was clearly more than a month after the publication of the Gazette Notice.

203. However, being aware of the intended auction sale, the Plaintiff reached out to the 2nd Defendant seeking for fourteen (14) days to arrange its finances and the 5th Defendant having been instructed by



the 2nd Defendant called off the auction. However, no payment was made and the 5th Defendant was re-instructed to once again proceed with the auction. An advertisement was carried in the Saturday Nation of 10th June, 2017. It indicated that the public auction was to take place on 19th June, 2017.

204. The auction proceeded and the 4th Defendant was declared the highest bidder. The Plaintiff did not set out what specific prejudice it suffered as a result of proceeding with the disposal of the consignment under DUGA and not the *Auctioneers Act* and the Rules thereunder.
205. Before I conclude on this issue, the Plaintiff submitted that disposal of goods under DUGA does not contemplate involvement of an auctioneer in the exercise of the right to sell by a custodian but rather gives the right to sell to the custodian of the goods where the depositor has not taken delivery of the goods. The 2nd and 5th Defendants concede this position but according to them, the involvement of the 5th Defendant was simply out of caution and not a requirement.
206. Indeed, DUGA does not anticipate the involvement of an auctioneer but it equally does not bar the involvement of one. One need not look far than page 79 of the Plaintiff's bundle. Auctioneers are not forbidden under DUGA but simply act in place of the custodian. I thus do not find the failure to proclaim/attach and notice to redeem to prejudiced the Plaintiff. Out of the notices he received, he got a reprieve for more than two (2) weeks.
207. On the third and fourth issue of collusion, conspiracy, fraud and conflict of interest, the Plaintiff in order to prove the same submitted on shareholding and directorship of the 2nd and 4th Defendant and their connection with the 3rd Defendant. According to the Plaintiff, the relationship of the 2nd, 3rd and 4th Defendants was not disclosed to the participating bidders before the auction. The 2nd and 4th Defendant are companies while the 3rd Defendant is a director of the 4th Defendant. In *Richard Akwesera Onditi v Kenya Commercial Finance Co. Ltd* [2010] eKLR, the Court of Appeal had the following to say: -
- “...fraud and collusion are serious accusations and require a very high standard of proof, certainly above mere balance of probability and the bare allegations put forward by the appellant do not therefore avail him...”
208. In the present case, other than showing the relationship between the two companies and the 3rd Defendant, the specific acts of collusion were not set out with particularity. A party cannot be condemned on blanket accusations without more. It is settled that a company is a separate and distinct legal personality from its shareholders, directors and promoters. *Victor Mabachi & Another v Nurturn Bates Ltd* [2013] eKLR where the Court of Appeal in affirming the position in *Salomon v Salomon* held as follows: -
- “...This being the case, Mediacom as body corporate is a persona juridica, with a separate independent identity in law, distinct from its shareholders, directors and agents unless there are factors warranting a lifting of the veil...”
209. The 3rd Defendant confirm is a nominal shareholder in the 4th Defendant's company and being a practicing advocate, he does not participate in the day to day activities of the 4th Defendant. Similarly, he stated that he has been Counsel for the 2nd Defendant since the year 2007. In relation to the consignment in issue, he confirmed that his role was to issue the demand notices as per his retention as legal counsel for the 2nd Respondent. On the auction, he stated that he neither attended the auction nor directed the 5th Defendant how to undertake the auction.



210. To prove the allegation of collusion and fraud, the Plaintiff needed to do more than merely list what it deemed as acts of collusion and fraud. In *Kibathi t/a Osoro Chege Kibathi & Co Advocates v Musti Investments Ltd (Civil Appeal E134 of 2022) [2024] KECA 270 (KLR) (8 March 2024) (Judgment)*, the Court of Appeal citing the case of *Vijay Morjaria v Nansingh Madhusingh Darbar & Another [2000] eKLR* held as follows: -

“...This Court has also rejected the notion that a party can prove fraud to the required standard purely from inference...We respectfully agreed with that view. If fraud were provable on a balance of probabilities, may be then it could be proved by inference. Where the court has to have assurance on a level that is above a balance of probabilities, we agree that fraud cannot be merely proved by inference...”

211. The specific acts attributable to the parties out to have particularized and proved to the required standards. Company searches cannot pass muster as to show acts of collusion and fraud. The fact that the 3rd Defendant has been the legal counsel for the 2nd Defendant was not rebutted. Similarly, the onus was upon the Plaintiff to show how the 3rd Defendant influenced the award of the bid to the 4th Defendant.

212. On conflict of interest, the Plaintiff submitted that there was appropriation of the Plaintiff's wheat before the date of the alleged auction. Though conflict was pleaded under the particulars of fraud, it is imperative that the issue of appropriation of wheat prior to the date of the alleged auction only arose during submissions. The introduction was due to the forensic report produced as Exhibit 5.

213. If indeed the Plaintiff wanted to rely on the said information, nothing was easier than to amend its plaint. Similarly, the issue as to whether any auction took place on 19th June, 2017 is for rejection. In prayer (c) of the plaint, what the Plaintiff pleaded was that a declaration do issue that the auction done on 19th June was done contrary to court order issued on 12th May, 2017 in Nairobi HCCC No. 195 of 2017.

214. In *Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018] eKLR*, the court had the following to say: -

“...It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded...”

215. Though the authorities cited on challenging Forensic Expert are the correct exposition of the law, the probative value of a document which is evidence at variance with the pleadings is as good as a mere appendage to the proceedings. It has been held that expert reports ought not to be considered alone but with other evidence. In *Stephen Kinini Wang'ondou vs. The Ark Limited [2016] eKLR*, Mativo, J (as he then was) observed as follows: -

“...I have considered the evidence tendered by the document examiner and the report prepared by the said witness and I am persuaded that the said evidence is not build on a substrum of facts which are proved to the satisfaction of the court according to the appropriate standard of proof. As stated above, such evidence must be read together with the rest of the evidence but not independently. The evidence by the document examiner in the opinion



of this Court does not establish that it is 'highly probable' that the documents in question were forged..."

216. On the fifth issue of legality of the auction, having found that there was no interference with goods within custom control and that the applicable law was DUGA, it follows that the 5th Defendant conducted himself as required. The wheat in issue had been in the warehouse for two and one year respectively and the Plaintiff indeed confirmed that the wheat grains have a shelf life of seven (7) months. Therefore, its value when it arrived in Kenya could not have been the same when it was being sold.
217. Section 7 (2) of DUGA obligates the custodian of the goods to take reasonable care to obtain the best price reasonable in the circumstances. The law therefore recognizes the present condition of the goods in issue. Wheat is not like real property that appreciates. It is common knowledge that for grains like maize and wheat, moisture content is a major consideration when purchasing the same.
218. On the sixth issue in regard to the reliefs sought by the Plaintiff, I have found that the 13,196.3138 Metric Tonnes less 4,000 Metric Tonnes which were covered by F89 was legally sold as confirmed by the 1st Defendant's testimony and documents. Therefore, the first declaration sought cannot issue. On the second declaration sought, I have found that the allegations of irregularities, fraud and conflict of interest were generalized and the 4th Defendant having legally acquired 13,196.3138 Metric Tonnes less 4,000 Metric Tonnes is deemed to have competitively purchased the wheat.
219. On the declaration that the auction done on 19th June, 2017 was done contrary to a court order issued on 12th May, 2017 in Nairobi HCCC No. 195 of 2017, none of the Defendants herein were parties to the said matter and no evidence was tendered that any of them were served. Having found that the 4th Defendant legally acquired the portion of 13,196.3138 Metric Tonnes less 4,000 Metric Tonnes, it would be onerous to declare it otherwise.
220. On the sum of Kshs. 730,292,207.28/=, I first note that this was the said total value of the 29,500 Metric Tonnes of wheat. The Plaintiff had already moved out a significant portion of the wheat from the 2nd Defendant. Even if this court was to award, the amount of wheat already taken would have had to be deducted. Secondly, this is a special damage claim and as such, it must be specifically pleaded and strictly proved. In the present case, the documents relied upon to prove payment consists of Bills of Lading, cargo manifests, invoices and a tripartite agreement. None of them are receipts.
221. Therefore, though pleaded, no prove was tendered and none is awarded. In Total (Kenya) Limited (formerly Caltex Oil (Kenya) Limited v Janevams Limited [2015] eKLR, it was held as follows: -

“...It is also a well settled principle of law that an invoice is not proof of payment and that special damages can only be proved by producing actual receipts or invoices endorsed with the word “Paid...”
222. On loss of anticipated profits, no report was tabled before court to show how much profit would the Plaintiff have made but for the complained act. At least having been in business, he ought to have audit reports without which the claim fails. The same goes with interest on anticipated profits.
223. Before concluding the matter, I wish to point out that the Plaintiff contributed greatly to its problems. Upon seeing the Newspaper Advertisement for 22nd May, 2017, a vigilant litigant would have rushed to court and obtain an order of injunction to give it better reprieve as it sorted out its finances. However, despite knowing that it had only fourteen (14) days to organize its finances, it waited until the auction



was reconvened. The Plaintiff acquiesced and therefore, he is estopped from raising issues against the auction.

224. Equity aids the vigilant and not the indolent. The Court of Appeal in Yusuf Mohammed Jiwa t/a Jiwa Properties & another v Mwangi & 2 others (Civil Appeal E014 of 2021) [2024] KECA 38 (KLR) (26 January 2024) (Judgment) addressing the issue of acquiescence referred to the Supreme Court of India decision in Chairman, State Bank of India & Anr. Vs. M.J. [2022] 2 SCC 301 which elaborated on the doctrine of acquiescence as follows: -

“...Doctrine of acquiescence is an equitable doctrine which applies when a party having a right stand by and sees another dealing in a manner inconsistent with that right, while the act is in progress and after violation is completed, which conduct reflects his assent or accord. He cannot afterwards complain. In literal sense, the term acquiescence means silent assent, tacit consent, concurrence, or acceptance, which denotes conduct that is evidence of an intention of a party to abandon an equitable right and also to denote conduct from which another party will be justified in inferring such an intention. Acquiescence can be either direct with full knowledge and express approbation, or indirect where a person having the right to set aside the action stands by and sees another dealing in a manner inconsistent with that right and in spite of the infringement takes no action mirroring acceptance...”

225. In the same decision, the Court of Appeal referred to Halsbury’s Laws of England, Vol. 16 [Butterworth’s, 4th Ed Reissue, 2000] at para 924 which held thus: -

“...The term acquiescence is ... properly used where a person having a right and seeing another person about to commit, or in the course of committing an act infringing that right, stands by in such a manner as really to induce the person committing the act and who might otherwise have abstained from it, to believe that he consents to its being committed; a person so standing-by cannot afterwards be heard to complain of the act. In that sense the doctrine of acquiescence may be defined as quiescence under such circumstances that assent may reasonably be inferred from it and is no more than an instance of the law of estoppel by words or conduct...”

226. It therefore follows that the Plaintiff’s silence knowing that there was an impending public auction acquiesced on its rights and should not be heard complaining. However, I note that the 3rd Defendant confirmed that he is holding a sum of Kshs. 28,492,951/= belonging to the Plaintiff and that he has no objection releasing the same to the Plaintiff. This being the position, I direct that the 3rd Defendant pays to the Plaintiff the sum of Kshs. 28,492,951/= free from any deductions within the next ten (10) days.

227. As for the 4,000 Metric Tonnes, the 1st Defendant shall be at liberty to deal with it in the manner it deems fit.

228. On the seventh issue, the 4th Defendant filed a notice of claim against Co-Defendant, that is the 2nd Defendant. However, it did not prosecute the same. The rule on prosecution of suits apply to third party notices and notices to co-defendants and as such, since the notice remained un-prosecuted. I proceed to strike out the same. The 4th Defendant’s submissions on this issue goes to no issue at all. Submissions cannot take the place of evidence.

229. Lastly, on the issue of costs, it is settled that the same follows the event. That is the import of section 27 of the *Civil Procedure Act*. The court reserves its discretion on whether to award costs to either party. This was well enunciated by the Supreme Court in the case of Jasbir Singh Rai & 3 others v Tarlochan



Singh Rai Estate of & 4 others [2013] eKLR. The suit has failed and as such, I direct that each party shall bear own costs.

230. Following the foregone discourse, the upshot is that the following orders do hereby issue:

- a. The Plaintiff's suit lacks merit and the same is hereby dismissed;
- b. The 3rd Defendant to release to the Plaintiff the sum of Kshs. 28,492,951/= free from any deductions whatsoever within the next twenty one (21) days;
- c. The 1st Defendant to deal with the 4,000 Metric Tonnes in its possession or nominee in the manner in deems fit; and
- d. Each party to bear own costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 4TH DAY OF APRIL, 2025.

.....

F. WANGARI

JUDGE

In the presence of;

Mr. Oduor Advocate for the Plaintiff

Mr. Nick Osoro Advocate for the 1st Defendant

Mr. Isaac Onyango Advocate for the 2nd and 5th Defendants

Mr. Busieka Advocate for the 3rd Defendant

Mr. Akanga Advocate for the 4th Defendant

Salwa, Court Assistant

