



REPUBLIC OF KENYA



**Almasi Bottlers Limited v Gamma Villa Limited (Civil Case  
8 of 2010) [2024] KEHC 8772 (KLR) (11 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8772 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
CIVIL CASE 8 OF 2010  
FN MUCHEMI, J  
JULY 11, 2024**

**BETWEEN**

**ALMASI BOTTLERS LIMITED ..... PLAINTIFF**

**AND**

**GAMMA VILLA LIMITED ..... DEFENDANT**

**JUDGMENT**

**Brief Facts**

1. By a plaint dated 1<sup>st</sup> February 2010 and amended on 21<sup>st</sup> February 2018, the plaintiff prays for judgment against the defendant for:-
  - a. A declaration that the defendant unlawfully/wrongfully detained the consignment of concentrates imported by the plaintiff under Entry Number 2009JKIA 848840 in December 2009 for the period between 23<sup>rd</sup> December 2009 to October 2010.
  - b. General damages for wrongful detention of the consignment of concentrates imported by the plaintiff under Entry Number 2009JKIA 848840 in December 2009.
  - c. A declaration that the defendant is liable and responsible, as the Customs Agent for the plaintiff in the period of 1<sup>st</sup> January 2009 to 14<sup>th</sup> October 2009, to compensate Mt. Kenya Bottlers Limited for the sum paid to the Kenya Revenue Authority plus the legal costs and tax consultancy fees incurred in defending its position on matters related to the disputed customs duty/tax.
  - d. Liquidated damages of Kenya Shillings Fifty Five Million, Five Hundred and Seventy Five Thousand, Six Hundred and Seventy Seven (Kshs. 55,575,677/-)
  - e. Interest on prayer d(i) above from the date of the cause of action at the prevailing commercial rates until payment in full.



- f. Costs of the suit.
2. The defendant filed its amended defence and counterclaim dated 8<sup>th</sup> June 2019 and prayed for judgment against the plaintiff for:-
  - a. A declaration that there is a binding contractual obligation between the plaintiff and the defendant as set out in the defendant's terms and conditions of service.
  - b. A declaration that the plaintiff is liable to settle invoice nos. 591, 591A, 591B, 597, 608, 609, 621, 626, 632, 640, 649, 648, 652, 658, 667, 677, 715, 819, 820, 821, 908, 948, 984, 1040, 1124 and 2023 less Kshs. 9,086,851.13/- which was payment already made.
  - c. Costs of the counterclaim.

### **The Plaintiff's Case**

3. PW1, Elijah Kagunda filed her witness statement dated 21<sup>st</sup> February 2019 and sought to rely on it. PW1 testified that he worked for the plaintiff company from October 2005 and was currently working as the Finance Manager. He further stated that the plaintiff used to import concentrates for production of coca cola blend of soft drink.
4. The witness testified that the plaintiff appointed the defendant through a tendering process which they advertised on 13<sup>th</sup> July 2007 upon which the defendant won the tender for the supply of services as a customs agent. The defendant was tasked with clearing consignments and then issue the plaintiff with an invoice including expenses incurred in the clearing process on the basis of which the plaintiff would reimburse the amounts payable on customs duty and other expenses believed to have been incurred by the customs agent. To request for reimbursement, the defendant would forward to the plaintiff payment receipts and the plaintiff would rely on such representations that the defendant had lawfully overseen the clearance of the consignments imported and make such payments within 30 days.
5. PW1 testified that on 14/10/2009, Kenya Revenue Authority (KRA) wrote to the plaintiff requesting for documents for the period between 1/1/2009 and 14/10/2009 relating to the clearing of consignment. On 30/11/2009, KRA wrote to the plaintiff a demand letter on outstanding taxes to the amount of Kshs. 79,887,261/- which the plaintiff disputed as they had paid value taxes through the defendant and had received evidence through invoices which the plaintiff had reimbursed to the defendant through receipts.
6. The witness stated that normally the defendant would apply for IDF(Import Declaration Forms), lodge the entry through Simba KRA system, obtain an entry, pay the taxes on behalf of the plaintiff and invoice the plaintiff with evidence of payment being a receipt from the bank. The plaintiff would then reimburse the defendant. Once the invoices were paid, on the face of the invoice the witness stated that he would indicate that it is paid through stamping the same and confirm the mode of payment.
7. The witness stated that the disputed tax led to the plaintiff instituting judicial review proceedings against KRA in Nairobi H.C. Judicial Review Appl. No. 107 of 2010. The witness further stated that the court dismissed its application on 23<sup>rd</sup> May 2016 and directed that it was open for the plaintiff to claim the sums paid from the defendant. The witness stated that they incurred legal costs in instituting the judicial review proceedings in engaging legal counsel for the sum of Kshs. 3,161,000/-.
8. PW1 testified that after the dismissal of the judicial review proceedings, KRA issued a fresh agency notice to the plaintiff for Kshs. 69 million. This prompted the plaintiff to engage the services of a tax consultant Taxtrail Limited to help them handle the issue with KRA and the consultant wrote to KRA requesting that the agency notice be stopped. However, KRA insisted that the plaintiff pay the notice



- to which the plaintiff paid Kshs. 5,481,709/- . The witness further stated that the reconciled figure came to Kshs. 52,060,606/- which the plaintiff was allowed to pay in instalments. For engaging the services of the tax consultant, the witness stated that they paid Kshs. 356,700/- to them.
9. PW1 stated that the defendant in 2009 withheld some consignments of concentrates while the dispute was pending. The first consignment came on 15/11/2019 and was cleared as required and the defendant demanded for their reimbursement of Kshs. 7,208,907/- which added to the invoice was Kshs. 8,668,261.64/-. The witness further stated that the plaintiff withheld payment because they wanted to verify the duty and resolve other issues with the defendant meanwhile as KPMG was investigating the dispute. The plaintiff therefore wrote to KRA on 15/1/2010 to which KRA replied on 22/1/2010 as regards Entry No. 2009 JKIA/828297 in reference to invoice 291 for Kshs. 7,208,907/- and stated that the tax was Kshs. 6,711,159/- meaning the defendant had exaggerated the amount.
  10. The witness testified that in the meantime, the defendant received and cleared a further consignment of concentrates valued at USD 341,152 which arrived on 13<sup>th</sup> December 2009. The witness further added that the plaintiff paid for the said consignment directly to KRA. The defendant claiming to have a right to hold lien over the concentrates in respect of invoice no. 591, refused to release the consignment of concentrates yet according to the prequalification documents and ward of tender, there was no clause entitling the defendant to hold lien.
  11. PW1 testified that they filed an application in court on 1<sup>st</sup> February 2020 for the release of the concentrates which was not allowed. Considering the concentrates could not be stored for long without going bad, the witness stated that they held a meeting with the defendant on 15<sup>th</sup> June 2010 whereby it was agreed that the concentrates would be released against payment of invoice no. 591. Following the consent order, the defendant released the concentrates in batches between June and October 2010 which were tested and found to be in good condition.
  12. On cross examination the witness testified that the defendant released the concentrates to them after they paid for them. He further stated that the concentrates were of good standards as they tested them.
  13. The witness further testified that the terms that the tender was subject to the conditions and terms of the defendant was not present at the signing of the tender. The documents the defendant relied on were filed later and were not part of the contract. The witness further stated that they were not aware of the terms and conditions which gave the defendant a right to general lien on any property of a customer in the event of non-payment. Further there was an interest of 2.5% on payments due.
  14. The witness further stated that in 2010 the plaintiff owed the defendant as follows;- Invoice No. 591 Kshs. 8,668,261.64/-; invoice no. 597 Kshs. 742,379.64/- and invoice no. 591A Kshs. 433,413.08/- totalling to Kshs. 9,844,054.36/-. The goods had been delivered to the plaintiff's premises in respect of the invoices.
  15. PW2, Joyce Wanjiru Munene adopted her witness statement dated 18/12/2019 and testified that she works for Kenya Revenue Authority in Investigation and Enforcement department and she had 18 years of work experience.
  16. The witness testified that they conducted investigations and established that the plaintiff had not paid the correct amount of taxes in respect of goods imported in 2009 and issued the plaintiff with a demand notice of Kshs. 52,060,606/-. The witness further stated that they discovered that the documentation which was presented by the defendant to clear the queried consignments of cargo for the plaintiff did not tally with the payments made to KRA. She further added that although the plaintiff contended



that it paid the taxes amounting to Kshs. 52,060,606/- to the defendant, the customs authority had never received such sums.

17. PW2 stated that in a letter dated 30<sup>th</sup> November 2009, the defendant was suspended from accessing the KRA's Simba system until the queries relating to the suspiciously cleared cargo could be investigated. Further, the plaintiff conceded and paid Kshs. 52,057,997/- . She added that according to the reconciliation exercise carried out by KRA, the supporting documents presented by the defendant in clearing the consignments of cargo to KRA customs for the period between 1<sup>st</sup> January 2009 and 14<sup>th</sup> October 2009 did not tally with the banking slips presented to the plaintiff.
18. On cross examination, the witness testified that they wrote to the plaintiff demanding Kshs. 63 million as tax owed on 4/3/2010. The witness said that the agency notice to the bank for payment of Kshs. 69 million owed by the plaintiff showed an increased amount which she stated was for the payment of the goods cleared. She further added that it was possible that the goods were released before payment.
19. PW2 further testified that at the time of importation, the documents required were commercial invoice, an IDF (Import Declaration Form) and a parking list. She added that they noticed that the invoice used at that time was the wrong one and stated that the documents were verified by KRA officers. The witness testified that the documents from the customs officer appeared genuine and the goods were released but later some discrepancies were found. She further added that she availed the report to the plaintiff which showed the results of their investigations.
20. The witness further stated that the defendant was a party to the dispute and was given a copy of the report. She added that she was part of the investigations team but did not visit the defendant's premises. The defendant was banned from the clearing house by locking them out of the system. The witness added that she did not recall finding any fraud save for the underpayment. She stated that based on the documentation used the tax assessment was properly done.

### **The Defendant's Case**

21. DW1, Francis Peter Kiranga filed his witness statements dated 18<sup>th</sup> October 2013, 31<sup>st</sup> March 2014, 8<sup>th</sup> June 2019 and 13<sup>th</sup> May 2022 and sought to rely on them. DW1 testified that he is the Managing Director of the defendant as from 1994 till date. He further testified that the defendant's core business is clearing and forwarding and that it also deals with border control business among other businesses. The witness stated that he handled cargo for the plaintiff since 1997 as their clearing agent. The defendant dealt with the plaintiff's imports which included compressors, bottle washing machines and concentrates for various soft drinks which concentrates came from Swaziland.
22. DW1 further testified that the business transaction between the parties was grounded on long established customary trade usages which was constituted by written memos, standard terms and conditions of services set by the defendant, which effectively created duties and obligations binding each of the parties to the transaction.
23. The witness stated that the plaintiff would inform them of a consignment and give them details of the airway bill or bill of lading, flight number and quantity of the goods. In the event the goods were transported by air, the plaintiff would give the defendant a letter addressed to the airline instructing them to hand over the original documents. The witness further testified that they would use the documents to process clearing through customs. The tax levied by customs by issuing a customs entry (C17) declaration form. DW1 further stated that they are the ones who did the declaration and the taxes were assessed based on the value of the goods. Upon approval by customs, the witness stated that they would pay the tax through KRA Customs department through the bank.



24. The witness testified that upon payment, they approached the airline and presented the documents to assess terminal handling charges which they paid on behalf of the plaintiff. The defendant would then transport the cargo to the plaintiff's warehouses and then transport the good to Nyeri. The witness stated that they would pay taxes for the plaintiff and any expenses incurred on delivery and then the defendant would present an invoice to them for reimbursement.
25. The witness testified that KRA Customs and Border Control has issued them with a licence annually since 1994 until date and at no one time was the defendant suspended. The witness added that customs department can only suspend one by issuing of a letter to that effect.
26. DW1 stated that they paid all their tax payments and were issued with tax compliance certificates for the 13 years since 1994. The allegations that the defendant did not pay tax in 2009 is untrue. The witness further stated that goods can only be released to them upon clearing of all the taxes. Further that failure to pay taxes would lead to not getting an operating licence for the subsequent year and a tax compliance certificate.
27. The witness further testified that the plaintiff engaged them on 27<sup>th</sup> May 1997 by a fax message and a letter dated 19/9/1997 was written to the airline to show that the defendant had been appointed as clearing agents on behalf of the plaintiff.
28. DW1 stated that the invoices covered items like taxes paid on behalf of the plaintiff, transport charges, handling charges and at the bottom of the invoices, it was stated that 'all our business are conducted in accordance with our standard terms and conditions for the time in force.' Further, the invoice provided that the copies of the terms and conditions were available on request. The witness stated that they always served the said terms and conditions on the appointing authority upon engagement. Clause 5 provided that the company shall have a general lien on the goods held to satisfy funds owing for a previous consignment whereas clause 10 provided that any expenses incurred by the defendant in the course of clearing would be recoverable from the client. The witness added that he personally sent the plaintiff the said terms and conditions.
29. The witness testified that they received a consignment on 15/11/2009 of 16,170kg of concentrates and they cleared it, paid all the taxes, local handling charges and transportation charges including forklift charges, delivered the cargo to the plaintiff's premises and raised invoice no. 591 on 17/11/2009 demanding for payment of Kshs. 8,668,261.64/- however the invoice has never been paid. Further on 13<sup>th</sup> December 2009 another consignment of concentrates of 10,805kgs arrived at JKIA.
30. The witness stated that he contacted the Managing Director of the plaintiff and informed him that the defendant was not in a financial position to pay the tax and the managing director informed him that they would pay the tax directly to customs. The plaintiff paid the taxes directly and paid the defendant Kshs. 1,543,166/- for handling charges however by the time the plaintiff sent the money the sum had risen to Kshs. 1,732,734/- and the defendant paid the deficit using their own money. The witness further stated that the cargo was then cleared and picked by the plaintiff but the defendant did not deliver the goods because the plaintiff had not cleared their invoice no. 591. The witness added that they raised invoice no. 597 for Kshs. 742,379.64 dated 24/12/2009 and the plaintiff did not settle the said invoice thus forcing them to detain the goods under their right of lien.
31. DW1 stated that the plaintiff then filed a suit in 2010 and the court directed that the plaintiff settles invoices nos. 591 and 597 totalling to Kshs. 9,410,641.28/-. The witness stated that the parties entered a consent in court and the plaintiff paid Kshs. 8,500,000/- whereas the defendant released the concentrates to the plaintiff. The unpaid balance is Kshs. 910,641.28/- which the witness stated remains unpaid to date. DW1 further added that there was a 2.5% interest for any unpaid dues and the



defendant has sent to the plaintiff invoices with the interest accrued every year with the last statement sent to the plaintiff in December 2022 of Kshs. 6,476,989.37/-.

32. DW1 stated that the plaintiff refused to pay them because the defendant owed them tax amounts not paid in clearance of their goods. The witness further testified that they did not forge any documents as alleged by the plaintiff and further KRA would not have released the goods on forged documents. The witness added that they paid the tax dues through the KRA Account at National Bank and KRA issued the plaintiff with receipts which they retained the copies and handed the originals to the plaintiff. Therefore, the witness stated that they could not have forged payment documents and furthermore, customs department and border control did not complain of any forgery nor was any legal or criminal action taken against them by KRA.
33. The witness stated that although PW2 testified that the defendant forged documents, no KRA staff visited their offices to inspect documents in regard to any complaint as required. D.W.1 denied that any investigations by KRA were carried out against their company.
34. The witness testified that they were claiming Kshs. 6,476,989.37/- as at 31<sup>st</sup> December 2022 plus costs and interest in their counterclaim.
35. On cross examination the witness stated that apart from the letter showing consignment of 1997, he did not have any document for 1998-2008 to show that the defendant cleared further consignments. The witness stated that it is not true that they came to the limelight again during the tender process and further that their application and participation did not mean that the defendant was not actively serving the plaintiff at that point.
36. The witness stated that although he signed the pre-qualification document, it did not amount to a contract between the parties nor was the letter of approval by the tender committee. The witness stated that paragraph F on page 5 of the pre-qualification document required the defendant to provide terms of payment and the defendant recommended that they be paid 15 days after presentation of an invoice. The witness further stated that its copy of page 5 of the pre-qualification document differed from that of the plaintiff's as his had the phrase 'as per the terms and conditions copy attached.'
37. The witness testified that the minutes for the procurement and tendering committee did not show that he produced the said terms and conditions.
38. The witness stated that he did not know whether he was entitled to hold the consignment of 2009 and further that there was no written contract between the parties on lien on the property of the plaintiff.
39. DW1 further stated that they received a letter from KRA indicating that their services were suspended but the defendant later cleared another cargo for the plaintiff which shows that they were not suspended.
40. DW1 further testified that the bank statements by the plaintiff showed that both taxes and handling charges were paid through them by the plaintiff but the witness added that it was hard to differentiate money for taxes or otherwise from the statement. The witness added that they had no obligation to pay taxes demanded by KRA for the plaintiff but the defendant paid what was due to them.
41. The witness stated that the invoice issued to the plaintiff was for Kshs. 9,410,641/- for non-payment of the two invoices nos. 591 and 597 which the plaintiff paid partly leaving the sum of Kshs. 910,000/- unpaid. The witness further stated that the breakdown for the charges was in invoice no. 609 dated 15/2/2010. The charges were for handling and storage charges and the total outstanding amount was Kshs. 1,365,966.28/-. The witness added that a payment of Kshs. 425,213.98/- on 11/10/2010 was



made to the defendant by the plaintiff. As of that date the outstanding amount was Kshs. 940,753/- which included interest on the amount owed.

42. Parties put in written submissions.

### **Plaintiff's Submissions**

43. The plaintiff submits that the defendant's services for the period relevant to this suit were engaged through a tendering process done in the month of July/August 2007. To support its contentions the plaintiff produced a newspaper advertisement as Pexh 1; prequalification contract as Pexh 2 and minutes of the plaintiff's procurement committee and letter dated 15<sup>th</sup> October 2008 confirming appointment as Pexh 3. The plaintiff further submitted that the defendant's allegations that it actively provided clearing services to it from 1995 to 2009 are false as evidenced by the letter dated 19<sup>th</sup> September 1997 confirming the defendant's appointment as a clearing agent and 25<sup>th</sup> March 1998 for termination of the short lived clearing agency services. The plaintiff submitted that from the said documents, it is clear that the defendant did not render services to them from the date of 25<sup>th</sup> March 1998 to 15<sup>th</sup> October 2008 when the defendant was re-appointed after successfully participating in the tender advertised on 13<sup>th</sup> July 2007. Thus, the defendant had the responsibility of adducing proof that it actually rendered services for the stated period, which it failed to do so. The plaintiff submitted that the only reason why the defendant made that bold allegation was to anchor its claim on the allegations that there were 'standard terms and conditions' which applied between them. The plaintiff urges the court to find that in respect to the current dispute that the defendant's appointment was from 25<sup>th</sup> October 2008, under the East African Customs Management 2004 as per the letter dated 25<sup>th</sup> October 2008.
44. The plaintiff submitted that the appointment of the defendant to render clearing agency services was based on the prequalification document which did not include the document referred to as 'Gamma Villa Terms and Conditions of Service. Furthermore, the plaintiff states that it saw the said document after the institution of the instant suit and therefore the plaintiff can never be said to have been bound by them beforehand. The plaintiff relies on the ruling by the court in the instant suit on 19<sup>th</sup> February 2010 and submits that the defendant did not deny that it never presented a copy of the document described as terms and conditions and none of the parties executed the same to bind themselves to be bound by those terms. As such, the plaintiff submits that in light of its evidence and the court's ruling dated 19<sup>th</sup> February 2010 where the court referred to the 'Gamma Villa Terms and Conditions' never formed part of the contract between the contract between the parties crystallized through the tender advertised on 13<sup>th</sup> July 2007. It is further argued that this court has no basis holding that the terms in the said document were binding upon the plaintiff prior to the institution of the instant suit. To support its contentions, the plaintiff relies on the Halsbury's Laws of England (4<sup>th</sup> Edition) Vol 9 (page 161-164) paragraphs 285 and 286 and further adds that it was never given an opportunity to consider the terms as part of the contract documents in the tender process leading to the letter of appointment of the defendant dated 25<sup>th</sup> October 2008.
45. The plaintiff further submitted that following the determination that the Gamma Villa Terms and Conditions did not form part of the contractual agreement, clause 5 which purports to reserve the defendant's right to exercise general lien cannot apply. Further, unless there was a specific contractual term between the parties, the defendant could only exercise a 'special/particular lien' over the consignment which was imported on 23<sup>rd</sup> December 2009 to enforce the payment of invoice no. 597 related to that particular consignment and not any other. However, the plaintiff submitted that invoice no. 597 was never in contest. The plaintiff thus argues that since their relationship was governed by the prequalification documents, the defendant remained a 'special agent' and not a 'general agent'.



46. The plaintiff relies on the case of *Trans Container Services (BASEL) vs Security Forwarders* [752 F2d 483] and submits that the defendant had no legal right to exercise ‘general lien’ over the consignment which was imported on 23<sup>rd</sup> December 2009 valued at USD 342,152 (Kshs. 25,927,552/-) invoice no. 597. The plaintiff argues that the said consignment differed from the consignment imported on 15<sup>th</sup> November 2009 on the basis of which invoice no. 591 was issued. The plaintiff further argues that KRA demanded for an amount in excess of Kshs. 79 million in unpaid taxes for the period of 1<sup>st</sup> January 2009 to 14<sup>th</sup> October 2009 for which period the plaintiff believed that it had paid all taxes based on representations made by the defendant to it. On that basis, the plaintiff argues that the defendant did not have any right to exercise lien over the consignment imported on 23<sup>rd</sup> December 2009 on account of the invoices relating to the consignment imported on 15<sup>th</sup> November 2009 as there was no contractual basis to exercise a general lien. Therefore, the plaintiff submits that the defendant unlawfully detained/ withheld the plaintiff’s consignment and is entitled to compensation for unlawful detention of its property. Relying on the cases of *Peter Ndungu Ngae vs Ann Waithera Ndungu & 2 Others* [2014] eKLR and *John Mbaabu & Another vs Kenya Revenue Authority* [2020] eKLR, the plaintiff submits that given the value of the concentrates unlawfully held by the defendant was USD 342,152 (Kshs. 25,927,552/-) and that the defendant held them for a period of 11 months when it was not possible for the plaintiff to have used them for the purpose they were supposed to be used, the plaintiff submits that an award of Kshs. 10 million in general damages would be fair and reasonable.
47. The plaintiff further submits that the defendant ought to refund it the taxes it paid directly to KRA in the sum of Kshs. 52,057,997/- as it was under the impression that the defendant acting as its customs agent was paying the tax between the period of January until October 2009 while in essence the defendant was making under declarations in regards to the consignments exposing the plaintiff to tax liabilities.
48. The plaintiff argues that it is entitled to a refund of Kshs. 52,057,997/- which it made to KRA and since the defendant had acknowledged receiving the funds for purposes of paying customs duty/tax, it ought to be refunded. Based on the holding in the Judicial Review case, the defendant is called upon to account for monies that it received from the plaintiffs as customs duty which were never remitted to the revenue collector. Thus, the plaintiff argues that the defendant never discharged its duty as a customs agent leading to massive losses on its end and exposing it to tax liability. Relying on the *Halsbury’s Laws of England* (4<sup>th</sup> Edition) (Vol 9) the plaintiff submits that the defendant as an agent was responsible to the plaintiff for any loss occasioned by its want of proper care, skill or diligence. Further in the case of *Republic vs Kenya Revenue Authority ex parte Unilever Tea Kenya* [2011] eKLR, the plaintiff states that where an agent acts without or in excess of authority or in fundamental breach of a contract between him and a principal agent will be personally liable for such acts.
49. The plaintiff states that PW2 told the court that upon discovery that the payments of customs duty alleged by the defendant to have paid were in fact not paid, the plaintiff was issued with new agency notices for the re-assessed sum, which the plaintiff proceeded to pay. As such, the plaintiff lost monies on account of the defendant’s failures to make proper declarations for the purposes of the payable tax. The plaintiff submits that the defendant owed a fiduciary duty to the plaintiff to give an account of the monies that it was paid as reimbursement for the import duty/taxes it purported to have paid KRA. Thus, if the said monies were not remitted to KRA by dint of law, the plaintiff contends that the defendant holds responsibility to make a full refund of the double tax paid by it.
50. The plaintiff submits that that although the defendant testified that they would organize with their bank and pay the tax amount on behalf of the plaintiff, the defendant never produced a single bank statement to show that any money moved from its accounts to clear the taxes disputed by the taxman.



Thus, the plaintiff argues that the defendant never discharged its duty as a customs agent to ensure that the plaintiff's consignments were properly cleared.

51. The plaintiff argues that it was justified in refusing to settle the defendant's invoices nos. 591, 591a and 591b on account of a claim against by KRA for unremitted taxes in the sum of Kshs. 79,887,261/- which was payable through the defendant as its customs agent. The plaintiff further submits that parties recorded a consent on 15<sup>th</sup> June 2010 to facilitate the release of the December 2009 consignment on condition that the plaintiff pay the amounts for invoice no. 591 leaving the other issues for determination. Such issues included the determination whether the defendant is entitled to interest in regards to the amounts charged in invoice no. 591.
52. The plaintiff states that it initiated judicial review proceedings in Nairobi H.C JR No. 170 of 2010 Republic vs The Commissioner General, Kenya Revenue Authority vs ex parte Mount Kenya Bottlers Limited where the court found that the defendant had made under declarations on behalf of the plaintiff for purposes of assessment of import duty/tax and thus in the process of initiating the futile proceedings based on the defendant's representations, the plaintiff was made to incur legal costs for a sum of Kshs 2,443,750/- and Kshs. 464,000/-.
53. The plaintiff relies on the case of Great Lakes Transport Co. (U) Ltd vs Kenya Revenue Authority [2009] eKLR and submits that in entering the consent recorded on 15<sup>th</sup> June 2010 it was in no way waiving any of its claims but rather was taking measures to mitigate the losses which would have compounded had the concentrates gone to waste. As such, the plaintiff prays for the refund of Kshs. 3,497,700/- for legal costs.
54. The plaintiff further submits that it hired the services of a tax consultant who reduced the tax liability to Kshs. 52,057,997/- which the plaintiff paid between the month of March 2017 to June 2017. The consultant hired by the plaintiff charged a sum of Kshs. 356,700/-. The plaintiff argues that the defendant whose actions led to the tax liability against the plaintiff with the consequent need for hiring a tax consultant cannot now turn around and claim that it is not liable to make good the plaintiff's loss through the expense for hiring a tax consultant.
55. The plaintiff submits that the counterclaim ought to be dismissed as the 'Gamma Villa Terms and Conditions' never formed part of the contract as between the parties and that the invoices as stated in the counter claim are not payable by the plaintiff to the defendant as they constitute interest upon interest compounded from the year 2009, which remained outstanding on the main invoice no. 591 for the consignment for November 2009.

### **Defendant's Submissions**

56. The defendant submits that in the year 1997 it actively rendered clearing and forwarding services to the plaintiff as one of the plaintiff's customs agent. The defendant further submits that the longstanding tradition between the parties was that the plaintiff would always first settle the invoices raised by the defendant and the defendant would thereafter forward the cleared goods to the plaintiff's manufacturing plant in Nyeri. The defendant submits that the terms and conditions of the long standing tradition are contained in the contract between the parties which the defendant produced as DexB7. The defendant further submits that the said terms and conditions were sufficiently made known to the plaintiff in that in every invoice billed and sent to the plaintiff since the year 1997 till 2009, there was a notice with the words below:-

TERMS: All our business is conducted in accordance with our standard terms and conditions for the time being in force. Copies of these terms and conditions are available on request. Interest of 2.5% per month will be charged on overdue accounts.



57. The defendant submits that the said words constitute the standard term contract and the said terms and conditions. The defendant further states that the plaintiff's witness did not ask for the said terms and conditions because they were furnished with the same and that having had the notice of the said standard term contract, they cannot in law have an excuse that they were not aware of the terms and conditions of such a contract.
58. The defendant states that until the year 2009, the plaintiff had faithfully paid all the regular invoices presented by themselves however in December 2009, without any justifiable cause the plaintiff refused to settle the balance on invoices nos. 591, 591A, 591B, 621, 632, 640, 648, 652, 658, 667, 715, 819, 820 and 821. The defendant further submits that in December 2009, it had cleared goods worth USD 383,151 for the plaintiff but the plaintiff refused to pay the costs incurred by the defendant in clearing those goods. Consequently, the defendant exercised its legal right of general lien, pursuant to clause 5 of the defendant's terms and conditions, over the plaintiff's consignment and held the said consignment in its storage facilities. The defendant further argues that by paying the said invoices, the plaintiff had both accepted and had sufficient notice of the applicable terms and conditions. Further, any claim by the plaintiff that it was not aware of the defendant's right to lien is unfounded and holds no water as the defendant's right to lien was well within the plaintiff's knowledge. Thus, the defendant submits that that plaintiff's claim for damages over the lien of the plaintiff's goods by the defendant must fail as it has no foundation in the contract between the parties.
59. The defendant submits that the plaintiff instituted the instant suit by an application dated 1<sup>st</sup> February 2010 for the release of the concentrates held by the defendant but the court dismissed the application as the court acknowledged that the defendant was rightfully exercising its right of general lien by withholding the plaintiff's goods until such a time when the plaintiff cleared the amount under invoice no. 591. The defendant further submits that by the plaintiff engaging it to an out of court settlement and recording a consent in court, the plaintiff by its own conduct and admission accepted that the instant suit was ill advised and defective.
60. The defendant further submits that it complied with the terms of the consent dated 3<sup>rd</sup> June 2010 and released the plaintiff's consignment but the plaintiff did not clear all the amounts owing to the defendant as a sum of Kshs. 940,753/- on invoice no. 591 remained unpaid, which amount continues to accrue interest at a rate of 2.5% per month, to date. Thus, the plaintiff remains in breach of both the court order of 18<sup>th</sup> June 2010 as well as its contractual obligations to the defendant.
61. The defendant argues that the plaintiff instituted judicial review Case No. 170 of 2010 in the High Court at Nairobi in an attempt to pin the purported unpaid custom duties on the defendant where it was enjoined as an interested party. However, the court dismissed the judicial review case on the basis of the plaintiff's negligence and incompetence finding the said judicial review application as being incompetent in both form and substance as the plaintiff was attempting to raise a case of fraud against the defendant in judicial review. Furthermore, the plaintiff did no appeal to the decision of the court and therefore the defendant argues that the plaintiff's purported claim for the costs incurred in the judicial review is unfounded in law and equity as no party should be punished for another's negligence and incompetence.
62. The defendant states that it has been established that indeed there was a legal contractual relationship between the plaintiff and the defendant and the said contractual relationship was governed by the trade customs and usages of the clearing and forwarding industry and by the terms of conditions of service provided by the defendant at the onset of the said contractual relationship.
63. The defendant relies on the case of *Leo Investment Ltd vs Estuarine Estate Ltd* [2017] eKLR and submits that there was a binding contractual relationship between it and the plaintiff. The defendant



states that the plaintiff extended an offer to the public by way of a tender advertisement posted in the Daily Nation Newspaper on 13<sup>th</sup> July 2007. In response to that public offer, the defendant put forward an application for tender and after the vetting process, the defendant was reappointed as one of the plaintiff's authorized customs agents. The defendant submits that the advertisement was a renewal process in that the defendant had previously acted for the plaintiff. As such, the defendant submits that the said documents demonstrate the existence of a legally binding contract between the plaintiff and defendant as the documents are evidence of an offer, acceptance and consideration, all of which are conditions required for the existence of a contract.

64. The defendant further submits that the contractual relationship proceeded smoothly until December 2009 when the plaintiff suddenly withheld payment from the defendant for goods rightfully cleared, forcing the defendant to rightfully withhold the plaintiff's goods until the plaintiff fulfilled its obligations of reimbursing the defendant for the work done under the contract. As such, the defendant argues that it is baseless for the plaintiff to claim any form of damages from the defendant, for the defendant's exercise of its legal right to lien goods not paid for, when it was the plaintiff itself that was in breach of the contract by failure to pay for its cleared goods as was the terms and conditions of their relationship.
65. The defendant submits that the plaintiff justified withholding the defendant's rightful payments based on a letter from KRA purportedly claiming unpaid taxes from the plaintiff. The defendant argues that the letter was a matter between the plaintiff and KRA and the defendant was not privy to the said relationship and neither was KRA a party to the contract between the plaintiff and the defendant. Thus, the defendant states that it was pompous of the plaintiff to have expected a free delivery of its cleared goods at the cost of the defendant. The defendant urges the court to find that it was fully within its rights to withhold and exercise the right of lien over the plaintiff's goods.
66. The defendant states that the plaintiff was in breach of its duties by refusing or neglecting to pay the defendant for goods already cleared in December 2009. The defendant further submits that it is a mandatory condition that no goods can be cleared from the customs office unless all necessary custom taxes and duties have been paid up. The defendant argues that at the interlocutory stage in this case, the plaintiff's own admission and conduct acceded to the fact that the present suit was ill advised and entered into a settlement with the defendant in which the plaintiff would pay the amounts owing to the defendant whereas the defendant would release the plaintiff's goods. The defendant states that it executed its obligations and released the plaintiff's goods but the plaintiff did not fully perform its reciprocating role of paying up all the amounts owed to the defendant. It is trite law that unless the duties in a contract are fully performed such a contract remains in force until such time as when it is fully performed. Accordingly, the unpaid amount has been accruing interest at the rate of 2.5% per month until when the subject overdue amount will be cleared. The defendant states that as of 31<sup>st</sup> December 2021, the amount owing to the defendant was Kshs. 6,194,763.41/-. The defendant further argues that the plaintiff has not put forth any reasonable defence to the said sum in the counterclaim and therefore the same is uncontroverted.
67. The defendant submits that although the plaintiff claims that the defendant did not pay taxes to the tune of Kshs. 49,790,619/-, the plaintiff has not offered any explanation as to how it came to enjoy services of the goods cleared by the defendant. Further at the hearing of the case, the plaintiff did not provide any evidence showing that the payments were never made. Instead the plaintiff claimed that the said payments were false and that the receipts from National Bank of Kenya were forgeries but the plaintiff did not tender any evidence to prove its claim for forgery. The plaintiff did not produce any forensic audit report showing that the monies were not paid nor did they call any witnesses or official from National Bank of Kenya to testify as to the authenticity or lack of, of the receipts. The defendant



therefore submits that the plaintiff has fallen short of its evidential burden of proof and thus its case must fail. The defendant submits that as a clearing agent, it executed its mandate professionally, above board and delivered all the goods in question. Further, KRA did not raise any claim against them over the amounts alleged by the plaintiff.

68. The defendant relies on the case of *Rooney vs CSE Bournemoth 2010* and submits that its terms and conditions were incorporated by reference, in every invoice given to the plaintiff from the words at the bottom of each invoice. Furthermore, although the plaintiff feigned ignorance of the standard terms and conditions, it admitted to receiving the various invoices from the defendant which clearly stipulated the notice to the standard terms and conditions. Following the legal pronouncement on the standard term contracts, the defendant argues that the plaintiff's prayer for damages over the right of general lien is unfounded.

### **Issues for determination**

69. On 16<sup>th</sup> March 2021 parties filed a list of 14 agreed issues for determination which are condensed as follows:-
- a. Whether there was a contract between the plaintiff and the defendant and what terms were applicable.
  - b. Whether there was breach of contract by any of the parties during the pendency of the contract, and if so, whether damages are payable.
  - c. Whether the Plaintiff is entitled to refund for taxes paid to Kenya Revenue Authority (KRA) during the intervening period, the legal fees paid to the tax consultant as well as the legal costs in respect of Nairobi J. R. No.170 of 2010.
  - d. Whether the defendant shall be paid the balance of the invoices that remained unpaid and following the consent of the parties in J. R.No.170 of 2010 and whether the interest claimed by the defendant on the sum owing of 2.5 per month is applicable.
  - e. Who between the parties shall bear the costs of this suit.

### **The Law**

70. It is a principle of law that whoever lays a claim before the court against another has the burden to prove it. Sections 107 and 108 of the *Evidence Act* provide as follows:-

Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

(108) the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

71. The burden of proof was discussed in the case of *Muriungi Kanoru Jeremiah vs Stephen Ungu M'mwarabua [2015] eKLR* where the court held as follows:-

As I have already stated, in law, the burden of proving the claim was the appellant's including the allegation that the respondent did not pay the sum claimed as agreed; i.e. into the account as provided....The trial magistrate was absolutely correct in so holding and did not shift any legal burden to the appellant...The appellant was obliged in law to prove that allegation;



after the legal adage that he who asserts or alleges must prove.....In the circumstances of this case, the respondent bore no burden of proof whatsoever in relation to the debt claimed. By way of speaking, the shifting of burden of proof would have arisen had the trial court magistrate held that the respondent bore burden to prove that he deposited the sum of Kshs. 98,200/- the debt being claimed herein.

72. Similarly, in the Halsbury's Laws of England, 4<sup>th</sup> edition, Volume 17 at paras 13 and 14:-

The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he had failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues.

The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence.

**Whether the contractual relationship between the plaintiff and the defendant was governed by customary usage or established by standard terms.**

73. The Plaintiff testified that the defendant was appointed through a tendering process which was advertised on 13<sup>th</sup> July 2007 whereas the defendant won the tender for supply of services as a custom agent. The existence of the contract was not in dispute. The defendant states that from 1997 to 2008 it had actively rendered clearing and forwarding services to the plaintiff as one of the plaintiff's clearing and forwarding customs agent. This was denied by the plaintiff who said that services of the defendant as custom agent were terminated in 1998 and that services relevant to this suit were given through a tendering process in July/August 2007.

74. On perusal of the record, the plaintiff produced a newspaper advertisement dated 13<sup>th</sup> July 2007 advertising for prequalification of suppliers of goods and services for the provision of clearing and forwarding services. The parties executed a prequalification contract signed by the managing director of the plaintiff and DW1 who was also the Managing Director of the defendant. The contract was executed on 19<sup>th</sup> July 2007 and was produced together with the minutes of the procurement management committee of 17<sup>th</sup> January 2008 of the plaintiff. A letter dated 15<sup>th</sup> October 2008 addressed to the Commissioner of Kenya Revenue Authority (KRA) by the plaintiff indicating that the defendant is their authorised clearing agent pursuant to the provisions of Section 146(2) of the East African Community Customs Management Act 2004. The plaintiff also produced a letter by themselves dated 19<sup>th</sup> September 1997 to the Operations Manager Cargo Services Centre advising them that they appointed the defendant as their forwarding and clearing agents. and a letter dated 25<sup>th</sup> March 1998 by the plaintiff addressed to the defendant terminated the contract of clearing services. It is evident that the documents produced demonstrate that the services rendered by the defendant were terminated on 25<sup>th</sup> March 1998. The plaintiff later advertised for the provision of clearing and



forwarding services through a tender process. Thus, the documents show that the plaintiff appointed the defendant through a tendering process in the month of July/August 2007.

75. On further perusal of the record, the defendant produced their letter addressed to the plaintiff dated 23<sup>rd</sup> May 1997 providing shipment details of cargo for clearing, a facsimile transmission dated 27<sup>th</sup> May 1997 from the plaintiff to Cotecna Inspection SA authorising them to release the inspection certificate to the defendant and a letter dated 19<sup>th</sup> September 1997 from the plaintiff to the operations manager, Cargo Service Centre, advising them that the defendant is their appointed clearing and forwarding agent.
76. It is not in dispute that the parties herein enjoyed contractual relationship. The point of departure is about the period when the contractual relationship began whether it was continuous or was broken at some point from the record, it is evident that the defendant did provide some services to the plaintiff from May 1997 until September 1997 and its services were terminated on 25<sup>th</sup> March 1998. Furthermore, although DW1 testified that the defendant actively provided clearing services to the plaintiff since 1997 until 2009, he did not produce any documentation to that effect. Therefore, it is my considered view that the contractual relationship between the plaintiff and the defendant began after the tendering process vide the letter dated 25<sup>th</sup> October 2008.
77. It is clear from the evidence that the contractual relationship between the parties was not continuous from 1997 to 2009 since the first contract was terminated in 1998.

**Whether the relationship between the parties was governed by customary trade usages and standard terms and conditions**

78. It is the plaintiff's case that the terms of engagement between the parties was provided for in the prequalification of goods/services providers which was filled by hand and executed by the defendant. The defendant argues that their contractual relationship with the plaintiff was governed by the trade and customs and usages of the clearing and forwarding industry and by the terms and conditions of service provided by the defendant at the onset of the said contractual relationship.
79. During the hearing, DW1 testified that the standard terms and conditions were available upon request by a customer. He further stated that he personally sent the plaintiff the said terms and conditions. The witness referred to the standard terms and conditions produced in evidence inscribed on invoices sent by the defendants to the plaintiff for reimbursement of funds. The witness further testified, that the invoices inscribed clause constituted the standard term contract and the said terms and conditions. The following are the words:-

TERMS: All our business is conducted in accordance with our standard terms and conditions for the time being in force. Copies of these terms and conditions are available on request. Interest of 2.5% per month will be charged on overdue accounts.
80. Looking at the prequalification of goods and services providers on it provides for the terms of payment in preference order to which the defence witness filled by hand and indicated:-
  - a. On presentation of the invoice (immediate) for taxes payable in advance
  - b. 15 days after presentation of invoice
  - c. 30 days
  - d. 45 days



**The said document was signed by the defence witness.**

81. Upon perusal of the Gamma Villa Limited Terms and Conditions provided and it is evident that the same appear to be standard terms and conditions. However, the said document has not been executed by any of the parties to indicate that they wish to be bound by the said terms and conditions. In fact, PW1 testified that he came to learn of the said terms and conditions after this suit was filed as the same were never presented to them at the onset of the contractual relationship. An affidavit sworn by DW1 on 5<sup>th</sup> February 2010 he did not deny that he never presented the said terms and conditions. Interestingly during the hearing, DW1 changed his tune and testified that he personally delivered the said terms and conditions to the plaintiff.
82. The defendant further argued that these terms and conditions were referred to in the invoices forwarded to the plaintiff and since the plaintiff paid the said invoices, it was bound by such terms and conditions. It is trite law that a party relying on standard contract must show that it has given reasonable notice to the other of the existence of those terms and conditions. In any case, as Serгон J. in his ruling delivered on 19<sup>th</sup> February 2010 held that invoices are not contractual documents but accounting documents which were issued by the defendant to the plaintiff after the tender deal had been sealed and awarded to the defendant. It is quite clear that the plaintiff was not given an option either to agree or reject the said terms. Sergon J. proceeded to state that the plaintiff was not given an option to either agree or reject the conditions. The court believed the plaintiff that the defendant did not avail the said terms and conditions to the plaintiff despite stating so during the hearing. As such, it is my considered view that the contractual relationship between the parties was governed by the prequalification of goods/service providers document executed by parties on 19<sup>th</sup> July 2007 and not by the standard terms and conditions designed by the defendant.

**Whether the defendant unlawfully detained the plaintiff's consignment imported in December 2009.**

83. The plaintiff argues that the defendant unlawfully detained its consignment imported in December 2009 from 23<sup>rd</sup> December 2009 until October 2010. The defendant states that pursuant to Clause 5 of the terms and conditions, it had a right of general lien over the plaintiff's goods until such time the plaintiff made good the payment in respect of invoice no. 591.
84. It was the testimony of PW1 that it imported its first consignment which came into the hands of the defendant on 15<sup>th</sup> November 2009 and on which basis invoice no. 591 was issued for a sum of Kshs. 8,668,261.64/-. The defendant released and transported the said consignment to the plaintiff's manufacturing plant pending payment of invoice no. 591. During the intervening period KRA issued the plaintiff with a demand letter of unpaid taxes in the sum of Kshs. 79 million. Meanwhile, the consignment of the subject suit valued at USD 342,152 (Kshs. 25,927,552/-) came into the hands of the defendant on 23<sup>rd</sup> August 2009 against which the defendant raised invoice no. 597. DW1 stated that they withheld the said consignment pursuant to Clause 5 of the terms and conditions which gave them authority to exercise a general lien over the plaintiff's goods in the event a claim remained unpaid.
85. Having found that the Gamma Villa Terms and Conditions did not govern the relationship between the parties, the defendant had no basis to exercise a general lien by withholding the plaintiff's consignment on account of the unpaid invoice no. 591 as provided for in Clause 5 of the said terms and conditions. There being no provision in the prequalification documents providing for the right of lien over the plaintiff's good in the event of non-payment, the defendant could not exercise a general lien over the plaintiff's consignment of December 2009. Therefore, it follows that the defendant unlawfully detained the plaintiff's consignment imported in December 2009.



## Whether there was breach of contract between the parties

86. In regard to the taxes demanded by KRA, the plaintiff claim that the defendant failed to discharge or was in breach of its duty as a customs agent thereby exposing the plaintiff to tax liability. The defendant argues that it discharged its duty and paid all the taxes during the period of 2008 and 2009 and released the plaintiff's goods but the plaintiff did not perform its reciprocating role of paying up all the amounts owed to the defendant.
87. From the record, PW1 and DW1 both testified that the plaintiff appointed the defendant as a customs agent for the specific purpose of clearing and forwarding the plaintiff's concentrates to its manufacturing and bottling plant in Nyeri. The defendant would pay for the various custom duties due on the plaintiff's imports and clear the imports with the relevant authorities, using its own money. The defendant would then temporarily store the cleared imports in its warehouses in Nairobi before forwarding the same to the plaintiff. The defendant would raise invoices to the plaintiff for compensation of the amount it paid in clearing the plaintiff's goods as well as invoices for the temporary storage and transportation costs involved before forwarding the cleared goods to the plaintiff.
88. DW1 testified that it would attach all the original receipts evidencing payments made at the customs office to clear the plaintiff's goods. The witness further testified that attached receipts of payment issued by National Bank of Kenya in favour of the tax authorities as well as the bankers cheques paid in favour of customs department paid at National Bank of Kenya. PW1 testified that they would review the documents presented by the defendant and pay them within 30 days.
89. Both parties agree on the mode of execution of their various duties. The bone of contention is the issue of the unpaid taxes. PW1 testified that on 30/11/2009, KRA wrote them a demand letter for unpaid taxes in the sum of Kshs. 79,887,261/- with an invite for a verification exercise for the period between 1<sup>st</sup> January 2009 to 14<sup>th</sup> October 2009. The plaintiff then engaged KRA vide correspondence dated 28<sup>th</sup> December 2009 in which it resisted KRA's demand on the basis that it had paid Kshs. 52,060,606/ through the defendant. The plaintiff thereafter instituted judicial review proceedings in Nairobi H.C Judicial Review Miscellaneous Application No. 170 of 2010 seeking for orders of certiorari to quash the decision of KRA for the recovery of a sum of Kshs. 63,789,724/- and a second agent notice for the recovery of Kshs. 69,048,048/-. The plaintiff further sought for the orders of prohibition directed at the respondent prohibiting KRA from recovering the said sums. The court dismissed the judicial review proceedings on the premise that the matter as instituted by the plaintiff touched on determination of whether the taxes were due and the amount of taxes which did not fall under the context of judicial review proceedings as envisaged under Order 53 of the Civil Procedure Rules. From there, it is the plaintiff's case that they engaged a tax consultant to assist in the post clearance audit whereby the tax consultant negotiated and the tax liability was reduced to Kshs. 52,057,997/- which the plaintiff paid between the month of march 2017 to June 2017
90. PW1 further produced a letter from KRA dated 18<sup>th</sup> March 2010 indicating that KRA had carried out its investigations and noted that the taxes regarding the importation of the listed consignments had not been remitted. KRA further stated that they confirmed that payments reflected in the National Bank receipts were fraudulent. PW2 testified to the same and stated that upon investigations, they discovered that the Import Declaration Forms filled by the defendant made under declarations of the tax payable on the plaintiff's consignments for the period between January 2009 to October 2009.
91. DW1 testified that they paid the taxes in question and he produced receipts of payment made in National Bank of Kenya in favour of KRA and copies of banker's cheques of customs department paid at National Bank of Kenya. DW1 further testified that once the taxes were assessed they would



organize with their bank to pay on behalf of the plaintiff. However, the witness never produced any bank statements to show that any money moved from its bank accounts to the accounts of KRA for clearance of tax. Upon the plaintiff said that the receipts from National Bank were fraudulent the burden of proof shifted to the defendants to prove the contrary. The defendant at this point had an obligation to show that money moved from their account to that of National Bank for clearance of the taxes due. The defendant ought to have produced bank statements to support the alleged transactions but they failed to do so. On being asked why they did not provide statements the witness stated that the statements if produced would show very many transactions from their accounts which was not necessary.

92. The credibility of the defendant in the tax issue was questionable in that no plausible explanation on the failure to remit tax as per the agreement of the parties was given. The evidence of PW2 a KRA officer confirmed that taxes were owing to KRA during the contract period of the parties which led to her employer issuing a tax demand to the plaintiff. This evidence corroborated that of the plaintiff to the effect that the defendant failed to remit tax between 1<sup>st</sup> January and 14<sup>th</sup> October 2009. The evidence of PW2 also pointed at under assessment of tax by the defendant during the existence of the contract. I am of the considered view that the defendant was in breach of the contract and as a result exposed the plaintiff to financial hardships and embarrassment.
93. The defendant further argues that the plaintiff breached the contract by failing to make due payments on invoice no. 591. From the record, the plaintiff instituted the instant suit by filing an application for release of the consignment of December 2009 and the same was dismissed. The parties then pursued an out of court settlement and recorded a consent on 16<sup>th</sup> June 2010 and the court adopted the written consent dated 3<sup>rd</sup> June 2010 as an order of the court. The consent provided that the plaintiff pays Kshs. 8,925,213.28/- and upon payment, the defendant releases the whole of the consignment of concentrates imported by the plaintiff under Entry No. 2009JKIA 848840. The record further shows that the plaintiff paid Kshs. 8,525,213/- to the defendant in respect of invoices nos. 591, 591(a) and 597. Following the consent order which was adopted as an order of the court, the plaintiff did not pay the full amount and left an outstanding sum of Kshs. 940,753/-.
94. The correct between the parties provided that upon presentation of invoices, by the defendant, the plaintiff was to immediately pay the amount indicated therein. This was meant to reimburse the defendant for the funds that he had spent in clearing the plaintiff's goods as well as payment of taxes. The rest of the invoices were sorted out by a consent of the parties. The pending invoice is No.591 for KShs.400,000.80 dated 17<sup>th</sup> November 2009. The plaintiff said that he withheld the payment for the reason that the defendant had withheld its goods following failure to pay taxes as agreed. In my view, the plaintiff was not justified to refuse to pay the defendant. It is wrong for one to pay a wrong with another. Looking at the terms of the contact on the period the amount was payable, the plaintiff had clearly breached the contract. More importantly, the breach continues in that payment has not been settled to date. This breach has put the defendant at a disadvantage and suffering in regard to its business.

**Whether the plaintiff is entitled to a refund of Kshs. 52,057,997/- from the defendant for taxes not paid on the plaintiff's behalf to KRA.**

95. The plaintiff argues that since the defendant had already received sums amounting to Kshs. 52,060,606/- for purposes of paying customs duty on its behalf, the plaintiff is entitled to a refund of the said monies.
96. It was the plaintiff's case that it paid the defendant a sum of Kshs. 52,060,606/- for purposes of paying taxes on its behalf. PW2 testified that they discovered that the payment of taxes alleged by the defendant



to have been paid were in fact not paid. KRA proceeded to issue the plaintiff with new agency notices for the re-assessed sum of which the plaintiff had to settle. DW1 did not deny receiving monies for payment of taxes from the plaintiff in accordance with the terms of the contract. The defendant said it discharged its duty of paying taxes on behalf of the plaintiff. However, not a single document supporting such payments was produced in evidence. Despite receiving the said amounts from the plaintiff, the defendant failed to pay and/or underpaid the requisite taxes. In my considered view, the plaintiff is entitled to the reimbursement of Kshs. 52,060,606/- being the amount he paid KRA for tax for which funds had been provided through the defendant in accordance with the contract.

**Whether the plaintiff is entitled to damages arising from unlawful detention of the goods by the defendant.**

97. It is the duty of a plaintiff to prove its claim for damages as pleaded. It is not enough simply to put before the Court a great deal of material and expect the court to make a finding in its favour. This principle was enunciated in the Court of Appeal case of Kenya Breweries Limited vs Kiambu General Transport Agency Limited [2000] eKLR where the court relied on the decision in Bonham Carter vs Hyde Park Hotel (1948) 64 TR 177 and stated:-

Plaintiffs must understand that if they bring actions for damages it is for them to prove damage, it is not enough to write down particulars and, so to speak throw them at the head of the court, saying 'this is what I have lost, I ask you to give me these damages.' They must prove it.

98. In the instant case, the plaintiff pleaded for general damages for wrongful detention of the consignment of concentrates imported under Entry No. 2009JKIA 848840 in December 2009. According to the plaintiff, the said consignment was valued at USD 342,152 (Kshs. 25,927,552/-) was withheld for a period of 11 months and were not used for their rightful purpose at the right time. The plaintiff claimed damages of Kshs. 10 million as reasonable compensation.

99. The plaintiff was a profit-making company from selling their products of soft drinks from the concentrates. The delay of eleven (11) months, in my view adversely affected the business of the plaintiff as such damages are payable and I award the plaintiff KSh.2,000,000/= as general damages.

100. In my considered view, the sum of KSh.10,000,000 is too high.

**Whether the costs incurred by the plaintiff in defending itself against the tax claim**

100. It is the plaintiff's case that due to the actions of the defendant, the plaintiff was exposed to tax liability. The defendant argues that the plaintiff was negligent and incompetent by instituting judicial review proceedings and raising issues of fraud against the defendant in the said case.

101. The plaintiff initiated judicial review proceedings in Nairobi H.C Judicial Review No. 170 of 2010 and incurred legal costs to the sum of 3,497,700/- for which he produced an invoice dated 19<sup>th</sup> July 2016 for Kshs. 2,443,750/- from the firm of Muthaura Mugambi Ayugi & Njonjo Advocates who represented the plaintiff in the judicial review proceedings. The amount of KShs.3,497,700 includes an invoice dated 26<sup>th</sup> March 2016 for Kshs. 464,000/- from the firm of Muthaura Mugambi Ayugi Njonjo Advocates who represented the plaintiff in an application to the Court of Appeal proceedings in C.A. Civil Appeal No. 139 of 2016.

102. On further perusal of the record, I noted that at the initial stages when KRA demanded the tax arrears, the plaintiff upon making inquiries from the defendant on the position of the matter, the defendant wrote to the plaintiff on 8<sup>th</sup> February 2010 and suggested that the plaintiff moves to court immediately



and ask for orders restraining KRA from unreasonably demanding taxes that they could not explain. On this premise, it is not in dispute that the defendant failed to discharge its contractual obligations to the plaintiff in paying taxes on its behalf as per the contract. The defendant further encouraged the plaintiff to move to court and challenge the tax demand knowing very well that the taxes were not settled during the existence of the contract. The defendant also benefited from the same proceedings in that the parties recorded a consent for payment of pending invoices where all of them were settled leaving a meagre sum as unpaid. As for the Court of Appeal application, the plaintiff did not give any evidence on its nature and relevance to these proceedings. As such, the claim of KSh.464,000/= fails the test of proof.

103. The plaintiff further argues that it is entitled to a refund of costs incurred by hiring a tax consultant to defend it against the tax claim by KRA. The plaintiff argues that the defendant's actions are the ones that led the plaintiff to be forced to hire a tax consultant to represent it in the post clearance audit. The plaintiff said that the consultant charged a sum of Kshs. 356,700/- for the said services. An invoice dated 14<sup>th</sup> August 2018 for the said amount was produced in evidence. In my view, these expenses of professional services would not have been necessary had the defendant fulfilled its obligations within the contract terms. The plaintiff was facing a threat of having to pay taxes to KRA failure to which had adverse consequences would have to be dealt with. It is my considered view and I so find that the defendant is liable to meet this cost for professional services rendered.

#### **Whether the counterclaim is merited**

104. On prayer (a) of the counterclaim, the court already made a finding that the standard terms and conditions of service of the defendant were not applicable and therefore this ground fails.
105. According to DW1, the amount outstanding is Kshs. 6,476,989.37/- as at 31<sup>st</sup> December 2022 calculated at the interest of 2.5% per month. It is the defendant's case that the terms and conditions of service provided for an interest of 2.5% per month on any unpaid sums until payment in full. Following the court's finding that the said terms and conditions did not apply in this case, the issue of interest at 2.5 per cent fails.
106. However, since the parties were governed by the terms of the pre-qualification documents and the same provided for payment within 30 days of receiving the invoice, the court finds that since the plaintiff did not pay invoice no. 591 within the agreed period this court awards the sum owing of KSh.940,753 to the defendant.
107. In regard to the breach of contract by the plaintiff for failure to settle invoice No.591/= I award the plaintiff damages of KSh.100,000/= to the defendant for breach of contract on payment of the invoice.
108. I hereby enter judgment in favour of the plaintiff for the following:-
- a. Tax refund 52,060,606
  - b. Cost of J R Proceedings 2,443,750
  - c. Tax Consultancy 376,700
  - d. Loss of business 2,000,000
109. Judgment is hereby entered for the defendant as per the counter claim for KSh.1,040,753/=
110. Interests on special damage claims are awarded at court rates until payment in full.



**Costs**

111. It is trite law that costs follow the event. Considering the facts of this case and the outcome, I hereby award the costs of the suit to the plaintiff. As for the counter claim, there shall be no order as to costs.

112. It is hereby so ordered.

**JUDGMENT DELIVERED, DATED AND SIGNED AT THIKA THIS 11<sup>TH</sup> DAY OF JULY 2024.**

**F. MUCHEMI**

**JUDGE**

