

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. E009 OF 2021

PLASTIPAK ITALIA PERFORME SRL.....PLAINTIFF

VERSUS

MARUBENI EUROPE PLC1ST DEFENDANT

MARUBENI EUROPE LIMITED.....2ND DEFENDANT

BUNZL PLC.....3RD DEFENDANT

BUNZL LTD4TH DEFENDANT

UNGA GROUP PLC5TH DEFENDANT

UNGA GROUP LTD..... 6TH DEFENDANT

KENYA PORTS AUTHORITY.....7TH DEFENDANT

JUDGMENT

1. On 2nd February, 2021 the plaintiff filed a plaint dated 29th January, 2021. The plaintiff stated that it is a company incorporated in Italy engaged in plastic bottle manufacturing and recycling in Europe, producing PET and HDPE bottles. In the said plaint, the 1st defendant was described as a company based in the UK which is engaged in a broad range of trading activities with respect to goods and commodities, including machinery and equipment. The 2nd defendant is said to be an affiliate company of the 1st defendant.
2. The 3rd defendant was described as a multinational distribution and outsourcing company based in the UK. The 4th defendant was described as a company based in Uganda and an affiliate company of the 3rd defendant.
3. The 5th defendant was described as a Kenyan based holding company that has a majority shareholding in companies that are involved in the manufacture and marketing of a broad range of human nutrition, animal nutrition and animal health products. The 6th defendant is said to be a company based in Uganda and an affiliate company of the 5th defendant.
4. The 7th defendant was described as a state corporation with the responsibility of maintaining, operating, improving and regulating all scheduled seaports on the Indian Ocean Coastline of Kenya.
5. The plaintiff averred that on or about the 14th September, 2020 it received communication from the 1st defendant asking for a quotation for PET granules. It was averred that the 1st defendant and the plaintiff entered into a contract on 17th September, 2020 to purchase and sell 5000MT of PET resin and that the 1st defendant made a purchase order for the PET resin on 18th September, 2020.
6. It was stated in the plaint that on 25th September, 2020 the plaintiff issued invoice No. 852000429 to the 1st defendant for the sum of 270,000.00 Euros with respect to 15 containers of PET resin, which amount was to be settled by 24 November, 2020 without any deduction.
7. It was averred that the plaintiff duly prepared and shipped 25 containers of PET Resin on transit to the 2nd defendant in Kampala, Uganda through the Port of Mombasa, on the instructions of the 1st defendant.
8. It was further averred that on 2nd November, 2020, the 3rd defendant made a purchase order for 300MT of PET resin and an agreement was made on 12th November, 2020 for the said purchase.
9. It was also averred that on the 15th October, 2020 the plaintiff issued invoice No. 852000466 to the 3rd defendant for the sum of 180,000 Euros with respect to the remaining 10 containers. That the said amount was to be settled by 14th December, 2020 without any deductions.
10. It was also claimed that on 2nd November, 2020 the plaintiff issued invoice No. 8520000570 to the 3rd defendant for the sum of 222,000 Euros. That the invoice indicated that the amount due was to be settled by 31st January, 2021 without any deductions.

11. It was averred that the plaintiff also entered into an agreement with the 5th defendant on 14th December, 2020 for the purchase and sale of 200 MT of PET resin to be delivered to the 6th defendant. The plaintiff indicated that the 10 containers were for transit to Kampala, Uganda through the Port of Mombasa and were to arrive in Kenya on 31st January, 2021. That the agreement with the 5th defendant was vide invoice No. 85200621 dated 31st December, 2020 and the containers were shipped on 8th January, 2021.

12. The said plaint was accompanied by a Notice of Motion application filed under certificate of urgency supported by the affidavit of Michael J. Plotzke, a director of the plaintiff. The said deponent also filed a witness statement on 2nd February, 2021. The plaintiff filed its list and bundle of documents. None of the defendants entered appearance.

13. Mr. Monari for the plaintiff appeared before this court together with Ms Ndirangu on 11th February, 2021. Ms Ndirangu prosecuted this suit. She indicated that in respect of the 3rd and 4th defendants, the goods had been transferred to Uganda and were in the custody of the Uganda Revenue Authority. She indicated that a court in Uganda had issued an order on 2nd February, 2021, restraining the release of the containers.

14. On the said date, Ms Ndirangu made an oral application to amend the plaint to include prayer (d) for reshipment of the consignment of goods.

15. This court agreed to proceed on with the hearing of the case as per the provisions of Order 19 Rule 1 of the Civil Procedure Rules. The plaintiff's Counsel was given the opportunity to file written submissions. The same were filed on 15th February, 2021.

16. In the said submissions, Ms Ndirangu indicated that she was relying on the affidavit filed by Michael T. Plotzke sworn on 29th January, 2021 as his evidence in this case. She stated that the 1st, 3rd and 5th defendants placed orders for goods to be supplied to their affiliated companies, namely the 2nd, 4th and 6th defendants based in East Africa.

17. It was submitted that the goods arrived at the Port of Mombasa on various dates. That it was then that it came to the plaintiff's attention that the persons who had placed the orders had done so fraudulently with the intention of the goods being carried off by unknown parties and for payment for the same not to be made.

18. She prayed for a permanent injunction restraining the 1st to 6th defendants from taking possession of the goods as prayed in the plaint. She also prayed for an order for reshipment of the containers with the goods. She also prayed for costs.

19. Counsel for the plaintiff relied on the case of **Kenya Power & Lighting Company Limited v Sheriff Malana Habib** [2018] eKLR, on the court's power to grant a permanent injunction to the parties to prevent injury to an innocent party.

20. She also relied on the case of **Rotem Kimyeve Maddeller Sanayi ve Ticaret AS v Sunland Chemicals Uganda Limited** [2019] eKLR, where the court granted the plaintiff an order for reshipment of the goods in issue to a country of the plaintiff's choice. The court also relied on the provisions of Order 19 rule 1 of the Civil Procedure Rules in resolving the said case.

21. She stated that when the containers reached Mombasa, it became clear that the persons purporting to represent the 1st, 3rd and 5th defendants were fraudulently misrepresenting themselves as being duly authorized to make orders or approve payment for consignments on behalf of the companies.

22. Ms Ndirangu submitted that the plaintiff was apprehensive that the 2nd, 4th and 6th defendants being the consignees of the goods would attempt to perpetrate fraud and take possession of them with no intention of making good the payment. She indicated that the PET resin which was shipped was to be purchased and paid for by the 1st, 3rd and 5th defendants for shipment to their purported affiliated companies, namely, the 2nd, 4th and 6th defendants based in Kampala, Uganda.

23. She indicated that their law firm served the defendants with hearing notices for the suit herein through their email addresses, but none of the defendants turned up on the virtual platform for hearing of this case.

ANALYSIS AND DETERMINATION

24. The issues for determination are:-

(i) If the plaintiff is the legal owner of the goods in the 35 containers lying at the port of Mombasa; and

(ii) If the plaintiff is entitled to the orders sought.

25. The suit herein proceeded to full hearing as per the provisions of Order 19 Rule 1 of the Civil Procedure Rules, 2010 which provide as follows: -

“Any court may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing, on such conditions as the court thinks reasonable:

Provided that, where it appears to the court that either party bona fide desires the production of a witness for cross-examination

and that such witness can be produced, an order shall not be made authorizing the evidence of such witness to be given by affidavit.” (emphasis added).

26. Having ascertained that none of the defendants entered appearance and filed any pleadings to controvert the averments in the plaint, this court had no difficulties in relying on the depositions contained in the affidavit of the plaintiff's director, Michael J. Plotze, which was sworn on 29th January, 2021. He deposed that after the shipment of the containers in issue, the plaintiff received communication on 15th January, 2021 to the effect that the 1st defendant's consignment arrived at the Port of Mombasa some time in November, 2020 but was yet to be collected.
27. He further deposed that the plaintiff sent emails on 15th and 19th January, 2021 to the 1st defendant to seek clarification of the delay but there was no response. It was then realized by the Plaintiff that the email address that had been used by the 1st defendant to communicate with the plaintiff was fake, which implied that the 1st defendant had not made any purchases from the Plaintiff and that it had not authorized any person to make any purchases on its behalf.
28. The plaintiff's deponent stated in his affidavit that they were shocked when they received emails on 27th and 28th January, 2021 from the 1st defendant seeking an amendment of the cargo manifest. That out of abundant caution, they checked the email addresses that the 3rd and 5th defendants had used in placing orders and discovered that they were fake.
29. The deponent stated that 35 containers were currently in the custody of the 7th defendant and were yet to be claimed by the 1st to 4th defendants. He also stated that he was apprehensive that the contents of the containers could be claimed by the 1st to 6th defendants or other unknown individuals seeking to defraud the plaintiff and evade liability for the consignment.
30. It was deposed that if the containers were to be removed from the jurisdiction of this court, the plaintiff would be deprived of the sum of 862,000 Euros, if no consideration was to be made for them.
31. This court has seen the documents filed by the plaintiff to support the claim of the orders placed with them for the purchase of the goods in issue. These include email correspondence between the 1st defendant and the plaintiff on 14th September, 2020, sales agreement between the plaintiff and the 1st defendant dated 17th September, 2020 and a purchase order made by the 1st defendant dated 18th September, 2020. Other documents filed by the plaintiff were invoice No. 852000429 issued to the 1st defendant dated 25th November, 2020 and invoice No. 852000466 issued to the 1st defendant dated 15th October, 2020.
32. The said invoices indicate the quantities of goods were purportedly ordered by the 1st defendant, Marubeni Europe PLC of 95 Gresham Street, London EC2U 7AB, England. The sales agreement and invoices between the 1st defendant and the plaintiff indicate that the former was given a credit period of 60 days from the date of issuance of the bill of lading. The goods were to be shipped to Marubeni Europe Ltd, P.O Box 324, Kampala, Uganda.
33. As per the waybill No. GEN 1171996 issued on 1st October, 2020, 15 containers were loaded aboard motor vessel CMA CGM VELA destined for the Port of Mombasa. The consignee was the 2nd defendant. Through another waybill GEN No. 1179651 issued on 23rd October, 2020 whereby the consignee was the 2nd defendant, the plaintiff shipped 10 containers of PET resin aboard motor vessel CMA CGM Columba.
34. Invoice No. 852000570 was issued to the 3rd defendant, Bunzl PLC of 45 York House, Seymour Street, London. It shows that the consignment reflected thereon was to be shipped to Bunzl Ltd, Nakawa Industrial area, P.O Box 451, Kampala, Uganda. The 3rd defendant was given a credit period of 60 days from the date of the bill of lading.
35. The plaintiff also relied on Waybill No. GEN 1194259 issued on 11th December, 2020 for PET resin packed in 10 containers loaded aboard motor vessel CMA CGM Callisto destined for the Port of Mombasa, with the consignee being Victrex Limited of Bunzl Bulting P.O Box 234 Kyetume, Uganda. The said company was referred to as the 4th defendant.
36. There was another order pursuant to an agreement between the plaintiff and the 5th defendant dated 14th December, 2020. It was purportedly made by Unga Group PLC, of Ngano Commercial Street Industrial area, Nairobi. The destination of the cargo was the Port of Mombasa, Kenya and the final destination was Kampala Uganda. The purported buyer who was the 5th defendant was given a 60 days credit limit. A copy of the bill of lading No. GEN 1203717 dated 8th January, 2021 indicates that the goods were loaded aboard motor vessel CMA CGM Aquila. The consignee was Unga Group Ltd (the 6th defendant), of plot No. 409 Baliniuma Road, Mengo – Kampala, Uganda.
37. Copies of email correspondence availed by the plaintiff's deponent indicate that on 15th January, 2021, Ms Claudia Puricelli of the plaintiff company sent an email to Michael Hammill of the 1st defendant informing him that they had been informed by the shipping line CMA that 7 containers were still at the Port (of Mombasa), yet the vessel arrived on 1st November, 2020. She requested him to check what was happening and give them an update. She indicated that the said containers were related to invoice No. 852000429 – SWB 1171996.
38. On 27th January, 2021 the 1st defendant's Michael Hammill sent a message to Claudia Puricelli giving her instructions to amend the cargo manifest to include a new consignee in Kenya by the name Magna Global Limited, of P.O Box 52901, Mombasa. The new Notify Party was given as Arsenal Cargo Logistics Ltd. The said email was followed by another one sent on 28th January, 2021 by Michael Hammill to Claudia Puricelli, asking if the amendments had been done.

39. According to the plaintiff's deponent, the failure by the 1st defendant to collect the containers on time, which was thereafter followed by instructions to change the consignee to a company domiciled in Kenya made them to become suspicious.

40. The plaintiff in this case was required to prove that it indeed shipped the goods stacked in the containers in issue. It did avail copies of purchase orders, sale agreements, invoices, waybills, email correspondence and bills of lading for the said goods. There is no evidence that was adduced to rebut the fact that the plaintiff was the shipper of the goods.

41. The plaintiff also proved that not a single coin was paid for the goods as they were shipped on agreement that they would be paid for, within 60 days of the date of the bills of lading. It is however evident that the persons who ordered for the goods had no intention of paying for the same but intended to defraud the plaintiff of the same. The plaintiff's Counsel indicated that some containers were cleared from the port of Mombasa and transported to Uganda and that a case has been filed in that jurisdiction.

42. Bills of lading are ordinarily documents of title but in this case from the depositions made by the plaintiff's deponent, the goods were obtained fraudently by persons who were purportedly working for the 1st, 3rd and 5th defendants. The said defendants therefore cannot claim to be the legal owners of the goods. As a result of fraud, the property in the goods was not transferred to them.

43. The plaintiff has proved that it is still the legal owner of the goods stacked in the containers which are lying at the Port of Mombasa. In the said circumstances it has proved its case on a balance of probabilities. The injunction which had been granted is hereby confirmed as failure to do so will result in the 2nd, 4th and 6th defendants laying their hands on goods which they are not entitled to.

44. The final orders that commend themselves to this court are that:-

(i) The plaintiff is granted a permanent injunction to restrain the defendants, by themselves, their servants, agents or any person acting under their instruction or without their instruction restraining them from disposing of, clearing, removing, taxing possession, dealing, exporting, smuggling, removing from jurisdiction, distributing or otherwise dealing with containers held at the Kenya Ports Authority (7th defendant) as outlined below –

Customer	Invoice Number	Bill of lading number	Container number	Vessel name	Date of arrival
Marubeni Europe PLC	852000466	GEN1179651	CMAU0201490 CMAU1432209 CMAU1789496 GLDU9889651 IPXU3919486 SEGU2282577 TCLU3422081 TRHU1087663 TRRU1174881 TRHU3086603		
Marubeni Europe PLC	852000429	GEN1171996	CAIU2362063 CMAU3119153 FCIU6229442 GESU1092156 SEGU1638004 TCKU3552262	CMA VELA CGM	AT MOMBASA PORT

			TRHU121535 TRLU9046442 CMAU3013393 FCIU2973440 TCLU2051659 BSIU2561327 TEMU2589153 TRHU2652162 TCLU7250041		
Bunzl PLC	852000570	GEN1194259	TEMU0545325 CAIU3337424 TEMU2554286 APZU3717972 CMAU3089721 CAIU3867450 TCKU3938403 TGHU0044768 ECMU1830381 FCIU4601247	CMA CGM CALLISTO	22 January 2021 at Mombasa Port awaiting transportation by rail to final destination ; KAMPALA
Unga Group PLC	852000621	GEN1203717	CMAU0739090 CMAU0397470 CMAU1123426 CMAU1645098 ECMU1773804 CMAU1221145 CMAU0183375 ECMU1519343 APZU 3724204 FCIU4300069	CMA CGM AQUILA	30 th January, 2021

(ii) The plaintiff is hereby authorized to reshipe the above containers to a destination of its choice;

(iii) Costs of this suit are awarded to the plaintiff as against the defendants; and

(iv) Interest on costs is also awarded at court rates.

DELIVERED, DATED and SIGNED at MOMBASA on this 12th day of March, 2021. Judgment delivered through Microsoft Teams online platform due to the outbreak of the covid-19 pandemic.

NJOKI MWANGI

JUDGE

In the presence of -

Ms Ndirangu for the plaintiff

No appearance for the defendants

Mr. Oliver Musundi - Court Assistant