



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
COMMERCIAL ADMIRALTY DIVISION
CIVIL CASE NO. 554 OF 2015

LUMA HOLDINGS LIMITED.....PLAINTIFF

-VERSUS-

KENYA REVENUE AUTHORITY.....DEFENDANT

J U D G M E N T

1. By a plaint dated 9/11/2015, the plaintiff claimed from the defendant a sum of Kshs. 57,443,060/- together with interest thereon. The claimed sum was the total amount of loss suffered by the plaintiff when the defendant allegedly unlawfully seized and took possession of the plaintiff's motor vehicle Mercedes Benz Actross Prime Mover Registration Number KBP 019T and Trailer Registration Number ZD 6409 (hereinafter "the **Truck**").
2. The plaintiff claimed that after the seizure, it lodged **Nairobi HC JR Misc. Application No. 57 of 2012 – Luma Holdings Limited –vs- Kenya Revenue Authority ("the JR suit")** whereby the court ordered the Truck to be released to it.
3. However, when the defendant returned the Truck to the plaintiff, the same was completely vandalized with electronic navigation controls and other parts missing. In the premises, the plaintiff claimed for the cost of repair at Kshs. 1,503,060/-, loss of income from 1/12/2011 to 9/2/2015 totalling Kshs. 52,440,000/- and depreciation of the Truck at Kshs. 3,500,000/-.
4. In its defence dated 11/01/2016, the defendant denied the plaintiff's claim in toto and put it to strict proof. It contended that it was not liable to satisfy the alleged losses. That no Notice to sue had been issued in terms of **section 13A of the Government Proceedings Act Cap 40** and **section 3(2)(a) of the Kenya Revenue Authority Act Cap 469**.
5. The plaintiff called three witnesses in support of its case while the defendant called one. **Celestine Lusweti Wosee (Pw1)**, a director of the plaintiff, testified that the plaintiff owned the Truck which it utilized for freight and transport within and outside Kenya. That the same was impounded by the defendant on 1/12/2011 and locked at the latter's warehouse at the Jomo Kenyatta International Airport, Nairobi.
6. As at that time, the police had investigated, arrested and charged the plaintiff's agents for stealing and/or handling stolen goods. That when the defendant refused to release the truck, the plaintiff filed the JR suit wherein it was ordered on 5/12/2014 that the defendant do release the Truck. When the same was released, the defendant found the same to have been vandalized.
7. Subsequently, the Automobile Association of Kenya inspected the same and estimated the repair costs to be Kshs 1,265,636/33 but the actual repairs costed Kshs. 1,501,480/74. That for the Truck was out use for 38 months whereby, the plaintiff suffered loss of use in the sum of Kshs. 52,440,000/-.
8. **Edwin Oyengo Oyugi (Pw2)** was the plaintiff's accountant since 2011. He prepared the plaintiffs accounts for that year and there was income of Kshs. 2,294,444/-. He projected that were the Truck to be in use for 3 years, it would have earned the plaintiff Kshs. 52,444,000/-. In cross-examination, he told the Court that he used primary documents of the plaintiffs accounts to prepare the estimated income for the Truck.
9. **Dedan Simiyu Silungi (Pw3)** was an employee of the **Automobile Association of Kenya**. He assessed the truck and prepared a report dated 27/11/2014. He estimated the repair costs to be Kshs.1,265,636/33. The vehicle was vandalized and he considered several factors that were necessary in arriving at his assessment.
10. **Charles Ngando (Dw1)**, a revenue officer with the defendant, testified that at the material time, he was working with the Rapid

Response Team of the defendant. He received information that the Truck had dumped transit goods into the local market. The defendant impounded the Truck, compounded the matter and the plaintiff settled the customs for the offence committed in accordance with the ***East African Customs Management Act, 2004 (“EACCMA”)***. The Truck attracted fines and warehouse rent in accordance with ***section 199 of EACCMA***.

11. The parties filed their respective submissions which are on record. It was submitted by the Plaintiff that the purpose for the award of damages is to put a Plaintiff back as far as possible in the same position it would have been if the tort complained of had not occurred. That the evidence tendered had proved loss and damage to the plaintiff. The case of ***Prem Lata v. Mbiyu [1965] EA 952*** was cited in support of those submissions.

12. On liability, it was submitted that the impoundment and detention of the Truck was unjustified as the reasons given for impoundment were speculative, contradictory and absurd. That even if the initial impoundment was legal as ruled in the JR suit the investigations by the police were completed by the 12/03/2012 and therefore further impoundment and detention was unlawful.

13. On its part, the defendant submitted that in the JR suit, the Court found that the initial impoundment was proper in order to conduct investigations. That it was however, wrong to have compounded the offence and imposed a fine under ***sections 199(b) (iii) EACCMA*** while the Truck was deposited at the Customs Warehouse by reason of ***section 211 (i) of the EACCMA***.

14. It was further submitted that the defendant was not liable for any loss or damage to the Truck because the defendant had reasonable grounds for seizing the same. That the plaintiff had not proved the claim for general and special damages. That there was no evidence to show the status of the Truck before and immediately after it was seized by the defendant. That the accounts produced by the plaintiff to prove special damages did not have primary documents relied on.

15. It was further submitted, that the plaintiff’s suit was brought in bad faith as the plaintiff was guilty of a Customs offence. That it is only after seizure of the Truck that the plaintiff paid taxes. That the Court had allowed the plaintiff’s application in the said suit due to a technicality, that the defendant had imposed a fine under a wrong or different section of the law. That the continued custody of the Truck was necessitated by the failure to pay warehouse rent.

16. The issue for determination is whether the defendant is liable for the loss and damage allegedly suffered by the plaintiff as a result of impoundment of the plaintiff’s Truck.

17. The legal burden of proof is provided in ***Sections 107, 108 and 109 of the Evidence Act Cap 80 Laws of Kenya***. The majority decision of the Supreme Court in ***Presidential Election Petition No. 1 of 2017 Raila Amolo Odinga & Another vs. IEBC & 2 Others (2017) Eklr.*** the court held: -

“Though the legal and evidential burden of establishing the facts and contentions which will support a party’s case is static and “remains constant through a trial with the plaintiff, however, “depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced”.

18. The Truck was seized in connection with investigations relating to a customs offence under the EACCMA. In the JR suit, the court found that the initial impoundment was lawful. This Court concurs with that finding in that, it was necessary to the impound the Truck for purposes of investigations.

19. The issue is, what of the continued detention after investigations, if any, were completed? It was the plaintiff’s contention that the continued detention was unlawful. On the other hand, the defendant’s position was that it was lawful as there was warehouse rent payable as an offence had been committed under ***section 199 of EACCMA***.

20. The evidence on record shows that, the Truck had carried goods that were on transit. Upon investigations, it was established that the goods were actually stolen and the culprits were charged with criminal offences in ***Nbi Criminal Case No. 175 of 2011 Republic v. Michael Cyado Mwanzuya & Others***. Neither the plaintiff nor any of its officers was found to have committed any offence, be it under the ***EACCMA*** or the ***Penal Code***. Indeed, the Truck was impounded after it had been released from a Police Station.

21. In the circumstances, was the defendant entitled to continue holding the Truck after 12/3/2021? It was the defendant’s submission that under ***sections 42(3) and 84(1)***, the plaintiff was liable to pay warehouse rent which it neglected to pay leading to the continued detention of the Truck. Dw1 testified that the plaintiff had committed an offence of conveying under ***section 199 of EACCMA*** and the defendant was therefore entitled to continue detaining the Truck.

22. ***Section 199 of EACCMA*** provides for the offence of smuggling of goods and the punishment thereto. There was no evidence to show that the plaintiff was guilty of any offence under that section. On the other hand, ***section 42 and 84 of EACCMA***, which were also relied on provides for goods deposited in the customs warehouses. It is such goods that attract warehouse rent.

23. In the present case, the Truck was not ‘goods deposited’ in a warehouse in terms of the aforesaid provisions. Further, the moment it was established that the goods on board the Truck had been stolen and not conveyed, the Truck and the owners thereof were exonerated from blame. The Truck should have been released forthwith without incurring any warehouse rent.

24. It was submitted that the Truck was deposited at the Customs Warehouse by reason of ***section 211(1) of EACCMA***. In this Court’s view, if the Truck had been found to have been used to commit any of the offences under the Act, then it could be said to have been deposited for the purposes of ***section 211(1)*** aforesaid.

25. Since that is not the case, the Court finds that the continued detention of the Truck after 12/3/2012 was unlawful and the defendant is liable to compensate the plaintiff for any loss arising from the said unlawful detention.

26. The plaintiff claimed Kshs. 1,503,060/- for repairs and Kshs. 3,500,000/ for depreciation. It alleged that the Truck was vandalized while in the custody of the defendant. The defendant contended that there was security at its warehouse round the clock. That there was no inventory or photographs or a motor assessor's report to show the status of the Truck before and immediately after it was seized.

27. To prove this claim, the plaintiff called **Pw3** who produced an assessment report from AA. PW3 testified that he went to the defendant's premises where he found the Truck and assessed it. He found its several parts vandalized and damaged. He estimated the repair costs to be Kshs. 1,265,636.33. The plaintiff produced receipts totaling Kshs. 1,503,060/- at pages **28 to 51 of Pexh.1** for the repairs.

28. The defendant's contention was that the plaintiff had not produced the inventory and photographs showing the condition of the Truck immediately before and after detention. This Court holds that, it was the defendant to show that the Truck was released in the same condition that it was when it was impounded. The testimony of Pw3 was firm and consistent that the Truck was in a vandalized condition when he assessed it. There were also receipts to prove the repair costs. The claim for Kshs. 1,503,060/- was therefore proved to the required standard.

29. As regards depreciation, although there was prove that due to exposure to harsh weather conditions, the Truck depreciated, there was no prove how the figure of Kshs. 3,500,000/- was arrived at. This is a special damage claim. Not only must it be specifically claimed, it should have been strictly proved. It was not proved.

30. The other claim was for loss of income to the tune of Kshs. 52,440,000/=. This was loss of income for the 38 months the Truck was in the custody of the defendant. It is the defendant's contention that the loss of income claimed by the Plaintiff is unwarranted as the Truck was lawfully in its possession during the period in question. That in addition, the Plaintiff did not produce primary documents relied on in preparing the accounts relied on.

31. The evidence on record showed that the Truck was being used for commercial purposes. It was generating income for the plaintiff. The Court has found that the continued detention after 27/3/2012 was unwarranted. The plaintiffs claim was for the period between 27/03/2012 and 9/02/2015 when the repairs were concluded.

32. In **Ryce Motors Limited and Another v Elias Muroki [1996] Eklr**, it was held: -

“There are umpteen authorities of this court to say that special damages must not only be specifically pleaded but must be strictly proved. Such authorities are now legion. The plaintiff simply gave evidence to the effect that his matatu was bringing him income of Shs. 4,500/= per day. He did not support such claim by any acceptable evidence. There was absolutely no basis on which the learned judge could have awarded the sum of Kshs. 2,830,500/= for special damages and we set aside the award in its entirety”.

33. Further, in **Shelly Beach Hotel & another v Kenya Revenue Authority [2019] Eklr**, the Court stated that: -

“Loss of profits or user is a special damage claim the law demands must be specifically pleaded and strictly proved. Indeed, the plaintiff gave particulars of what each truck would have earned per month in gross figures but that was all the plaintiff did. There was nothing more. In business like the one pleaded by the plaintiff there are obvious and necessary incidental expenses and overheads like fuel, levies and operating costs including staff salaries which naturally and obviously affect the net sum deemed profit. Even that profit is then subjected to taxation and it is not enough that the plaintiff would earn the sum quoted in accepted the letter of offer and its acceptance”.

34. In the present case, the plaintiff provided bank statements and the projected loss of income for the period of the 38 months. This was prepared by **Pw2**. The plaintiff did not produce the primary documents relied on by Pw2 to estimate the loss of income at Kshs 1,380,000/- per month. That figure was highly presumptive and speculative.

35. However, there was prove that the plaintiff was unlawfully denied loss of use of its Truck for approximately 32 months. The bank statements produced by the plaintiff support the tax returns for the plaintiff produced by the defendant in its **Dexh1**. Those returns show that for the period of 4 months when the Truck was in operation, September – December, 2011, there was profit of Kshs. 2,294,444/-. That translates to approximately Kshs. 573,611/- per month.

36. This Court takes note of the testimony of **Pw1** that the plaintiff had not yet established a dedicated clientele for its freight business. That meant that the income would not have been consistent. In the circumstances the Court assesses loss of use at Kshs. 400,000/- per month. As to the period of loss, the Court considers 32 months to be extremely long. The plaintiff would be expected to mitigate its losses. The Court would allow a period of 12 months only.

37. Accordingly, the loss of income would be assessed at Kshs. 400,000/- by 12 months making a total of Kshs. 4,800,000/-.

38. The court is satisfied that the plaintiff has proved its case on a balance of probability. Judgment is hereby entered for the plaintiff against the defendant for: -

- a. Kshs. 1,503,060/= being the cost of repair of the Truck;
- b. Kshs. 4,800,000/- loss of income.

c. The claim for depreciation is dismissed

d. Costs of the suit and interest thereon are awarded to the plaintiff.

e. Interest on a) and b) above at Court rate from the date of filing suit.

It is so decreed.

DATED AND DELIVERED AT NAIROBI THIS 13TH DAY OF MAY, 2021

A. MABEYA, FCI Arb

JUDGE