



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 26 OF 2009

TRANSOUTH CONVEYORS LIMITED.....PLAINTIFF

-VS-

KENYA REVENUE AUTHORITY.....DEFENDANT

JUDGMENT

1. In this suit, the plaintiff claims from the defendant special damages in the sum of Kshs 504,274,887 and USD 576,751/80 together with interest, exemplary damages and costs and interest thereon on the foundation that the plaintiff being at all material times, a registered sugar importer dealt with the defendant as the public authority established to collect taxes for the government of Kenya.

2. It was pleaded in the plaint dated 29th May 2009 that pursuant to Legal Notice No.12 of 01/03/2004 by the Minister of Finance, Gazette Notice No.296 of 11/01/2007 and a letter dated 12/01/2007 by the Kenya Sugar Board (KSB), the plaintiff opened the requisite letters of credit through African Banking Corporation and imported from Egypt, a state member of the Common Market for Eastern and Southern Africa(COMESA), Free Trade Area, into Kenya, a total of 5,000 MT of raw/white sugar valued at US\$1,840,000 (hereinafter referred to as the subject consignment).

3. The plaint further pleads that on 02/02/2007, the defendant maliciously and without any colour of right put an advertisement in the Standard Newspaper whose import was to change the effective date of importation of the 2007/2008 duty free sugar from COMESA from 01/02/2007 as had earlier been published by KSB to 01/03/2007. The plaintiff pleaded that by virtue of the defendant's said decision, its consignment of sugar was liable to be subjected to duty of 100% contrary to the intimation by KSB in Gazette Notice No.296 aforesaid. According to the plaintiff, the said wrongful act by the defendant resulted to its inability to clear its consignment as the duty payable thereon was prohibitive. The consequential effect was that the plaintiff's sugar was liable to and was put in the custody of the defendant awaiting the payment of the said prohibitive duty wrongly levied by the latter. The plaintiff thus pleaded that the African Banking Corporation Limited returned the letters of credit opened with it on the basis of zero rated duty to Egypt for cancellation as a result of the defendant's decision and application of 100% duty on the subject consignment. The plaintiff pleaded that due to the aforesaid events, it was forced to divert facility of US\$2,032,000 it had been granted by Transworld Corporation Limited of Dubai, meant to finance a separate importation, to pay the consignors of the subject consignment as a consequence of which the plaintiff alleges that it lost business opportunity and was subjected to huge losses including interest on the diverted loan, interest of the letters of credit, storage charges and loss of business reputation with its suppliers for the failed, cancelled and/or retired letters of credit. It is pleaded that the defendant's wrongful and illegal action was challenged vide **NRB Civil Appeal No.89 of 2007 Transouth Conveyors Ltd v KRA & 2 Others** and the Court of Appeal ordered the unconditional release of the said consignment to the plaintiff.

4. In its statement of defence dated 17/07/2009, the defendant admitted that it is legally charged with the responsibility of collecting tax but denied knowledge of the plaintiff being a registered sugar importer. It further averred that the promulgation of Legal Notice No.12 of 01/03/2004 by the Minister for Finance to allow for importation of sugar on duty free basis from COMESA was not for any sugar from COMESA Member States. The defendant admitted issuing Press Notices dated 02/02/2007 without any malice but maintained the same was meant and had been previously used to explain and clarify the implementation of Legal Notice No.12 of 01/03/2004. Further averment was that the defendant was entitled to clarify issues which arose between KSB and itself in reference to Legal Notice No.12 of 01/03/2004 issued pursuant to Section 118 of the Customs & Excise Act by the Minister for Finance and as previously implemented by all those affected by the Legal Notice's tenor. The defendant in denying ever imposing prohibitive duties on the plaintiff's sugar or at all, contended that the plaintiff had the option of reshipping or clearing the sugar under protest or give security pending the determination of the judicial review proceedings.

5. The defendant blamed the plaintiff for loss of business, if any, on the grounds that the latter was granted conditional stay pending determination of an intended appeal upon furnishing security for the taxes to the former so that the sugar could be released but the plaintiff failed to meet the conditions. In praying for the dismissal of the suit, the defendant maintained that it was exercising its statutory power and duty under the relevant law. The defendant also averred that the findings of Civil Appeal No.89 of 2007 could not form the basis of the plaintiff's claim herein as it had acquiesced to the accrual of losses and/or deterioration of the return on profits even when it had the option of mitigating such loss and/or deterioration, if any. The defendant also denied being served with a notice of intention to sue, and maintained that

even if the same had been issued, it did not conform to the form prescribed by Section 13A of the Government Proceedings Act as read with Section 3(2) (a) of the Kenya Revenue Act.

6. At the trial, the plaintiff called 2 witnesses with the defendant calling just one. Paul Ogango Mikera **PW1**, the plaintiff's manager, testified that the plaintiff was engaged in the business of clearing, forwarding and transportation then adopted his two witness statements as evidence in chief after producing the documents filed as **EXh P1, 2 and 3** in support of the case.

7. In cross examination, he stated that his duties were to oversee the general operations of the company and that the plaintiff's biggest claim was on interest on letters of credit. That in practice, one acquires letter of credit when one is negotiating the importation and that the sugar was imported from Sugar and Integrated Industries Company Ltd, Egypt but the letter of credit dated 08/02/2007 at page 34 was not addressed to the company and that the sugar arrived in different consignments. He admitted having not provided a statement of interest charged on the letters of credit save for a calculation by the plaintiff and a bank statement from Southern Credit Banking Corporation Ltd at page 123. That they exported 5,000 MT worth USD 1,840,000 whose pro forma invoice is at page 66. The declared value of the sugar was Kshs 38,692,372.52 at an exchange rate of 69,059 per dollar for 1500MT and there was another consignment of 1,000MT whose declared value was Kshs 25,794,917.68 at the exchange rate of 69.059 to the dollar (pages 94 and 112) which when converted to USD comes to 933,799 USD for 2,500 MT. They imported in February according to the customs entry at page 94 and the cargo had arrived by 19th February hence it would have been very difficult to change the dates so they filed a **JR No.120 of 2007** which was disallowed till on appeal when the court allowed the conditional release of the cargo upon provision of security which they did not furnish. He confirmed that they had not exhibited any document by which they were to sell the sugar to show that they lost business.

8. In re-examination, he stated that their loss was calculated based on the market dynamics which is the difference in pricing at the time they were to sell before detention and the time they sold after the release. He referred the court to the documents at pages 38-93 and 94-148 to show the statistics of sugar trade including selling prices for which they calculated the losses. He added that they did not comply with the conditions of stay because they lacked the financial capability to do so and stressed the fact that there were import declarations to show they indeed imported sugar worth 1.8 USD in particular the customs entry for 2500MT valued at Kshs 64,487,294 at the exchange rate of 69.059 and that the letters of credit only financed 1000 MT with the remaining 4000 MT being financed by ABC Bank, Akaba Investments and Transworld Corporation (pages 58- 59 & 61-64). He maintained that the plaintiff's claim was on the costs of the letters of credit and the interests charged thereon (pages 113-117) together with the interest payable to Southern Credit Bank (pages 120-134). The Letter of credit they got for working capital was largely for their operations and they had adduced evidence to show they paid for such operations. When they made the declaration, they had a valid reason and expectation to import the sugar before the date was changed and that they could not declare the cargo twice due to the change of the importation date.

9. Mr. Abdulhalim Said Omar (**PW2**), the plaintiff's auditor, told court that his duty in preparing the audit report (Exh.P3) was to establish losses incurred by the plaintiff by virtue of the seizure of the subject consignment by the defendant and that the failure to settle the letter of credit in time resulted to the calculation at page 5 of his report. The interests on the margin for the 1000 MT and the interest on handling charges are exhibited at page 7 & 136 while the payment of the interest is exhibited at page 122. The demurrage paid on the goods is exhibited at page 6 & 307 of PEx1. At page 8 is the working of interest on loan from Transworld which was for something else but was diverted here hence the interests paid and the evidence of payment is at pages 61, 62, 63 & 64 of PEx 1. At page 9 is the calculation of interest charges due to the delay by ABC Bank owing to late payment of the letter of credit which was in Kenya Shillings. At page 10 of PEx 3 are storage costs occasioned by the sugar being held and there are invoices by Mitchell Cotts (page 310) and payment receipts at page 11-24 of PEx3. At page 25 of his report are the various charges paid to Southern Credit Bank on delayed payments totaling to Kshs 7,252,057.40. He calculated the loss of business opportunity for 2 years based on the variation of sugar prices, then settled on 25% as the possible yield for the period of 2 years (page 27 of PEx 3) totaling to Kshs 202,500,000. At page 28 is the loss occasioned by the failure to sell the sugar on the due dates which is the same as the loss at page 27. The plaintiff paid 7% sugar levy which had reduced to 4% at the time the sugar was released and the exchange rate had also increased (pages 29 & 30).

10. During cross examination, he confirmed that there were differences between his two reports (Ex P3 & Ex P2) and added that the subject consignment was only released pursuant to a court order. He stated that he had based his calculations on the invoice for demurrage, which is charged on delay to return the containers, dated 2009 at page 307. He confirmed that he was neither shown any contract for the sale of the sugar nor disclosed how much the same was ultimately sold at per bag.

11. Upon re-examination, he stated that the letter of credit from ABC was for 4000MT , that the costs he had given at page 28 was inclusive of all costs and levies and that the goods were not released on one day as shown by the invoice at page 310 of PEx1.

12. When asked questions by the court, the witness said that there were no documents showing that the loan from Transworld was diverted to the subject consignment and that goods left CFS at the discretion and leave of the defendant.

13. For the defence, Pamela Ahango (**DW1**), the Chief Manager, Risk Management Division, of the defendant, gave evidence to the effect that in 2007, she was the manager in Policy division in charge of inter-relational and Regional operations. According to her, the subject consignment arrived after the period allowed for importation had closed and could not be allowed in duty free. That the defendant did not seize the subject consignment but held it pending payment of duty and taxes due. That disputes during clearance were expected and an importer could either pay the taxes under protest or give a bank guarantee under the Protocol in the COMESA Rules of Origin. It was concluded that the plaintiff was allowed by the court to have the subject consignment upon provision of a bank guarantee which she was not sure whether it had ever been provided.

14. During cross examination, she confirmed that she knew KSB was the body mandated to control and regulate sugar matters pursuant to section 27 of the Act and that the defendant could not allow importation of sugar by a person not registered by the Board. That the issuance of licenses and permits to import sugar was a preserve for the Sugar Board only and that she presumed the plaintiff was licensed as it imported 89,000MT of sugar. That the subject consignment was released pursuant to the court of appeal order made on 30/05/2008. She disputed that the defendant delayed in lodging the entries for the release of the sugar and that they had complied with the court of appeal order save for payment of CFS charges.

15. In re-examination, she stated that administration of imports was not imposed by COMESA but left to the country and its agencies and the defendant's role herein was to monitor imports and collect taxes due. That KSB did not have offices at the point of entry and that it was the duty of the importer to make entries. When questioned by the court, she maintained that there were no fresh entries for the release of the sugar hence the old entries were used for the release and that archived documents were capable of retrieval.

16. The parties filed their respective submissions on 17/02/2020 and 13/10/2020. The plaintiff submitted that the imposition of 100% duty by the defendant on the subject consignment contravened the legitimate expectation by the plaintiff that the same would be cleared zero-rated and therefore the defendant's actions of demanding 100% duty on the subject consignment were unlawful as rightfully held by the court of Appeal in *Transouth Conveyors Limited v Kenya Revenue Authority (2008) eKLR Civil Appeal No. 89 of 2007* which decision has never been reviewed and/or overturned through any appeal to the Supreme Court. It was further submitted that the resultant effect of the defendant's demand of 100% duty on the subject consignment was the cancellation of the letters of credit from African Banking Corporation which the plaintiff had not legitimately expected as the consignment was sourced and financed on the basis of zero-rated duty, but another Letter of Credit for 1,000 MT from Southern Credit Banking Corporation Limited was not cancelled. That as a result of defendant's actions, the plaintiff was forced to convert/divert part of the funds from a facility of US\$ 2,032,000 granted by Transworld Corporation Limited of Dubai meant for a separate transaction to pay the consignors for the subject consignment leading to loss of business opportunities. That the defendant's delay in releasing the subject consignment even after the court of appeal order in *Civil Appeal No. 89 of 2007* occasioned the plaintiff further losses and damage and it is therefore entitled to compensation. It was concluded that the subject consignment upon release was sold at a loss of Kshs 1,800 per bag as the value of the Kenyan Shilling against the US Dollar had drastically declined. The plaintiff relied on the cases of *Transouth Conveyors Limited v KRA & 2 others (2008) eKLR, Raila Amollo Odinga v IEBC & 2 Others (2017) eKLR, Dakiang Distributors (K)Ltd v Kenya Seed Company Ltd (2015) eKLR and Trade Bank Ltd v Engineering Construction Ltd (2000) 1 EA 266* in support of its case that the wrongful conduct by the defendant had been finally adjudged and was *res judicata* and that parties are bound by pleadings and cannot be permitted to lead evidence that deviates from the filed pleadings.

17. On its part, the defendant submitted that since the plaintiff's suit stems directly from the decision of the Court of Appeal in *Transouth Conveyors Limited v KRA & 2 others (2008) eKLR*, the High court has no business discussing and/or intervening the same in any way. The court was reminded of the defendant's importance to the stability of the Republic as the sole agent for collection of taxes. The plaintiff is blamed for its non-adherence to the court of appeal ruling in issuing a bank guarantee and for failure to pay the taxes under protest with the possibility of redeeming them if the suit was determined in its favour as measures for mitigating the loss. The defendant maintained that it held the subject consignment pursuant to a lawful court order and that the plaintiff lost this cause of action the moment the court of appeal rendered its ruling on issuance of the bank guarantee.

18. It was argued that the injury became actionable when the ruling on stay was overturned by the judgement of the court of appeal and that the failure by the defendant to release the subject consignment unconditionally to the plaintiff was in strict compliance with the court of appeal ruling, in good faith and in public interest. The court was urged to allow the defendant the wiggle room to make mistakes as it is a public body performing an important public function of holding the fulcrum of our democracy. It was concluded that the special damages pleaded were not supported by evidence and as such the plaintiff's suit should be dismissed. The defendant relied on the cases of *Transouth Conveyors Limited v KRA & 2 others (2008) eKLR, R v Principal Secretary, Ministry of defence ex-parte George Kariuki Waithaka (2018) eKLR, Econet Wireless Kenya Ltd v Minister for information & Communication of Kenya & anor (2005) 1 KLR 828, Central Bank of Kenya v Ratilal Automobiles Ltd & others (2006) eKLR, Gregory Kitonga Wambua & 2 others v County Government of Kiambu (2019) eKLR, Kenya Tourist Development Corporation v Sundowner Lodge Ltd (2018) eKLR, Banque Indosuez v DJ Lowe & Co. Ltd (2006) 2 KLR 208 and Okulu Gondi v South Nyanza Sugar Co. Ltd (2018) eKLR* in support of its submissions that all disputes ought to have been resolved in the earlier suit, that the failure to provide security as order by the court of Appeal militated against the plaintiff's claim, that court orders must be obeyed by all and that the claim for special damages have not been proved to the requisite standards.

19. Having considered the evidence on record and the rival submissions of the parties, I discern that the issues for determination are whether the plaintiff has proved its case to the requisite standards and thus entitled to the special damages of Kshs 504,274,887 and US\$576,751/80 together with the exemplary damages sought. I discern that to be the only issue because the wrongfulness of the defendants impugned actions was finally determined by the court of appeal and the decision binds upon this court under the principle of *stare decisis* and the doctrine of *res judicata*. In so far as the decision of the court of appeal between the parties remain unchallenged it remains that the conduct of the defendant of shifting the opening and closure dates for importation of the plaintiff sugar, was unlawful and all injury or harm therefrom flowing must in justice and fairness be made good by the wrongdoer.

20. My starting point must be the defendant's pleading that the plaintiff failed on its duty to mitigate own losses by failure to pay the duty under protest, reshipping the consignment outside Kenya and even providing the security ordered by the Court of Appeal. In my opinion and view the duty to mitigate losses never goes beyond what a reasonable man would do in particular circumstances. However, the duty imposed should not be stretched to obligate a litigant to go to the extent of rewarding a wrong. It shouldn't be extended to defeat the need to obey the law and due process. The duty should be applied conscientiously to avoid rewarding unscrupulous litigant from benefiting from own designed default^[1]. In *Mohamed Saleh & Company v Kenya Revenue Authority [2016] eKLR*, the court took the duty to mitigate own losses to be: -

It is not that a person seeking to protect his rights to property should be faulted and penalized for doing so through the constitutionally sanctioned process. I hold that to deny the plaintiffs prayers on the alleged grounds that it ought to have paid the duty, it was not obligated to pay, as a way of mitigating own losses, would be to push the duty to mitigate losses to a level that encourages a public body, like the defendant, to trample upon people's rights with the expectation that the victim has no otherwise but to pay an unlawful tax. That would be in total negation of the right to access justice and to fair administrative action. The court in that event would be deconstructing the constitutional gains and benefits Kenyans have bestowed unto themselves.

21. In the instant matter, I do not consider that the plaintiff temporized, his loss to enhance the possible pecuniary loss it now claims. Rather I do find that the defendant had acted in a high handed manner and unlawfully and the plaintiff was entitled to insist on fairness and application of the law to not only protect a property right but also cushion and safeguard the rule of law. I thus hold that the duty to mitigate losses should not be applied here to the disadvantage of the plaintiff.

22. The plaintiff's claim is for the recovery of the sum of **Kshs 504,274,887 and USD 576,751** being trade losses suffered by the plaintiff as a consequence of the defendants change of date of entry of the plaintiff's consignment which then founded the defendants claim for duty on the consignment leading to delay and the attendant losses by way of demurrage and diminished value of the Kenyan shillings against the dollar.

23. The undisputed and common facts in the matter are that the Minister for Finance by a Legal Notice No.12 of 01/03/2007 declared the sugar imported from COMESA amounting to 8,900 MT in 2007/2008 quota would be tax free. The KSB on 11/01/2007 through Gazette Notice No.296 notified importers including the plaintiff to import the duty free raw/white sugar of up to 8900 MT between 01/02/2007 and 28/02/2007. The plaintiff, a registered sugar importer, made arrangements and imported from Egypt the subject consignment pursuant to the opening of the requisite letter of credit valued at US\$1,840,000. The defendant published in the Standard newspaper of 02/02/2007, a directive that the effective date of importation of 2007/2008 sugar quota to be imported duty free from COMESA Free Trade Area would be 01/03/ 2007 and not 01/02/ 2007 as earlier on published by KSB in Gazette Notice No. 296.

24. The plaintiff exhibited various documents inter alia certificate of incorporation dated 14/05/1997, certificate of registration of importers of Mill White Sugar issued on 09/07/2007 to show that it was a registered sugar importer and various other document on how the sum claimed as damage and lost business opportunities was calculated and proved to be the direct result of the defendant's action.

25. It is trite law that special damages must first be pleaded and then strictly proved need not be gainsaid. One only needs to be reminded of what the court said in *Ouma v Nairobi City Council (1976)KR 304*, on the need to specifically plead and strictly prove special damages stated.

26. Having found that the plaintiff has proved its case against the defendant on a balance of probabilities, my next and outstanding task is to establish whether the plaintiff is entitled to the damages sought. I consider the evidence of PW2 to qualify for expert evidence. That evidence was never shaken even upon cross-examination and I find it to persuade me that the losses as calculated by that expert were indeed incurred. I take it as a matter of general knowledge and local notoriety that business people engage in businesses to make profits and that when one is denied the expeditious opportunity to turn round its capital, then the vagaries of economics including variations in exchange rates and other market forces set in with attendant consequences. Here I find that the consequences are the losses claimed and proved by the plaintiff.

27. In his evidence, PW2 said that he calculated Kshs 202,500,000 as the loss of business opportunity for 2 years based on the variation of sugar prices and Kshs 197,815,000 as the loss occasioned by the failure to sell the sugar on the due dates. That gives a sum of Kshs 382,315,303.40. In addition, there were extra storage charges paid to Mitchell Cotts Freight Kenya Ltd, Kshs 72, 169,400, loss on exchange rates of Kshs 20,240,000, loss on sugar levy Kshs 3,869, 238 as well as costs and interests on opening the LCs and incidental services like insurance. All aggregates to Kshs 504, 274, 887/=.

28. Even the claim in US Dollars was equally proved by the same witness. As said before, that evidence was never shaken nor controverted and I do therefore enter judgment for the plaintiff against the defendant in the sum claimed being **Kshs 504,274,887 and USD 576,751/80**. I do enter judgment for the plaintiff against the defendant for those sums.

28. on exemplary damages, I adopt the definition and object in *Godfrey Julius Ndumba Mbogori & another V. Nairobi City County (2018) eKLR* that: -

“Exemplary damages are essentially different from ordinary damages. The object of damages in the usual sense of the term is to compensate. The object of exemplary damages is to punish and deter. We are guided by the case of *Rookes v Barnard [1964] AC 1129* where Lord Devlin set out the categories of cases in which exemplary damages may be awarded which are:

i) in cases of oppressive, arbitrary or unconstitutional action by the servants of the government, ii) cases in which the defendant's conduct has been calculated to make a profit for himself which may well exceed the compensation payable to the plaintiff and iii) where exemplary damages are expressly authorized by statute.”

39. Here, defendant, as adjudged by the court of Appeal, changed the effective dates of importation and then imposed undue duty on the plaintiff's consignment at 100% and thereafter unreasonably failed to release the subject consignment to the plaintiff. That conduct I find to be oppressive and high handed and are aggravating the courts view on the defendant. While the defendant contends that it should be given room to make what it calls mistakes because it is a public body performing an important public function of holding the fulcrum of our democracy, I do not agree. I refuse to agree because being a state agency and public body, it is currently bound to observe the values and principles of governance. It cannot be allowed to injure citizen on the basis of being a public body. It is instead bound to act most reasonably and efficiently in good faith to imbue public confidence in the important public duty imposed and vested upon it.

30. In the circumstances therefore, I am satisfied that the defendant's action was so arbitrary and oppressive and justify an award of exemplary damages. Having so found and giving regard the special damages I have awarded, which I do consider to substantial, I award to the plaintiff, the sum of Kshs 1,000,000 as exemplary damages to demonstrate the courts disapproval on the defendant's conduct.

31. The upshot from the foregoing findings and conclusions is that the plaintiff's claim succeeds and judgment is therefore entered as follows:-

a) Kshs 504,274,887 and USD 576,751/80.

b) Exemplary damages, Kshs 1,000,000

c) interest at court rates and costs

32. Interests on **a)** shall be calculated from the date of the suit while on **b)** and **c)** be calculated from the date of this judgment.

DATED, SIGNED AND DELIVERED AT MERU VIRTUALLY VIA MICROSOFT TEAMS ON 17TH MAY 2021

P.J.O OTIENO

JUDGE

[1]In *David Murithi Githaiga v CFC Stanbic Bank Limited* [2019] eKLR, the court said: -

“The policy consideration underpinning this principle is to prevent unscrupulous persons to temporize their loss for as long as possible in order to derive maximum benefit. Such conduct is not only unjust but stealth and veiled greed; it is this conduct the principle of mitigation of loss seeks to restrain for the sake of fairness and justice.”