



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 47 OF 2009

AKABA INVESTMENTS LIMITED.....PLAINTIFF

VERSUS

KENYA REVENUE AUTHORITY.....DEFENDANT

JUDGEMENT

1. The Plaintiff instituted this suit vide a Plaint dated 10th November, 2009 seeking judgment against the Defendant for special damages of USD 1,132,460.45 and Kshs. 405,108,353.30 respectively together with interest thereon at the current market rates as well as exemplary damages and cost. Together with the plaint there was filed two witness statements together with a list of some 89 documents as well as a supplementary list of documents whose purpose must be seen to have been to introduce the audit report, judgment of the court of appeal and orders issued by the court of appeal as well as bulletins by the defunct Kenya sugar Board on sugar statistics and the plaintiffs' bank account statements
2. The Defendant filed a statement of defence dated 23rd November, 2009 in which it admits the description of the parties and the Order in Civil Application No. 231 of 2007 but denies the particulars of loss and damage allegedly suffered by the Plaintiff as particularized in the plaint. The Defendant also filed Defendants List & Bundles of Documents dated 25th March, 2015 together with a witness statement by Pamella Ahango filed on 27th March, 2015.
3. The history of the litigation in this suit commences with the Legal Notice No. 12 of 1st March 2004, by which the Minister for Finance declared that raw/white sugar be imported from COMESA amounting to 111,000 Metric Tonnes of refined white sugar and 89,00MT of other sugar in each year until the end of February 2008 . The gazette notice declared that the import would either be duty free or at a reduced rate of duty as per the schedule thereto published. Pursuant to the said Legal Notice No. 12 of March 2004, the Kenya Sugar Board published the Kenya Gazette Notice No. 296 of 12th January,2007 notifying sugar importers who wished to import sugar during the year 2007 under COMESA arrangement as per regulation 12 of 2004, to do so from 1st of February 2007 up to February 2008. However, on 2nd February 2007 the Defendant herein put up an advertisement in the national dailies that the effective date for such sugar importation would be 1st of March 2007 and not 1st of February 2007.
4. The Plaintiff being a licensed importer of sugar, contends and pleads that in that year, it imported under 4000MT of sugar into Kenya from Egypt under the above stated COMESA duty free sugar quota arrangement. Its sugar import was vide two consignments of 100MT and 3000MT. The Defendant action on its directive issued on 2nd February, 2007 claimed that the Plaintiff's consignment of sugar was liable to be subjected to duty of 100% contrary to the information by the Kenya Sugar Board. As a result of the above, the Plaintiff could not clear the aforesaid consignment of 4000MT. the Plaintiff's said sugar was thereby put in the custody of the Defendant in warehouses awaiting the payment of the said duty.
5. Pursuant to the aforesaid actions of the Defendant, the Plaintiff lodged judicial Review proceedings challenging the said action in **Miscellaneous Application No. 258 of 2007 Akaba Investment Limited Vs. Kenya Revenue Authority 2 Others**, which was subjected to the outcome in **Court of Appeal Civil Appeal No. 231 of 2007**. In its judgment dated the30.05.2008, the Court of Appeal ordered the Plaintiff's consignment of sugar to be released free of all charges and duty thereby quashing the decision of the defendant to impose taxes upon the consignment.

The Plaintiff's Case.

6. During the trial, the Plaintiff's witnesses adopted averments and contents of Abdulbasit Swaleh's (PW1's) Further Witness Statement as well as that of Abdulhalim Said Omar (PW2's) Witness Statement, both filed on 13th July, 2007.
7. From the evidence of PW1 and PW2, the Plaintiff's case is that on account of the directives by the defendant, the consignment was

unlawfully withheld for a period between March 2007 and 30.5.2008 when the same was ordered to be released forthwith pursuant to the Order issued in Civil Appeal No. 213 of 2007, but the Defendant failed to comply up to 19th December 2008 thereby occasioning an additional delay of more than six months.

8. The plaintiff contends that in order to import the COMESA sugar valued at USD 1,454,000, it opened a letter of credit with African Banking Corporation Ltd which facility expired while the sugar was still withheld necessitating renewal. As a consequence of unlawful acts by the defendant the plaintiff contends that it lost the opportunity to sell the sugar when due with the consequence that prices dipped, its resources were wrongfully withheld and it therefore suffered financial losses which had been worked out by an accountant in the figures pleaded at paragraph 11. It being its case that the injury was visited out of the wrongful acts by the defendant, the plaintiff asserts to be entitled compensation for losses thus suffered. The the Particulars of loss were distinctively set out and working thereof explained by PW2.

9. In cross-examination of both witnesses not much touched on the workings of the financial losses with the defendant's counsel dwelling much on the otherwise decided matter of whether the failure to release was lawful and what steps the plaintiff undertook to mitigate the losses.

The Defendant's Case.

10. The Defendant's witness, Mrs. Pamela Ahago also adopted her witness statement dated 24th March, 2015 and produced the bundle of documents filed on the 27.03.2015 as exhibits. The gist of her evidence was that the processing of the COMESA sugar for release by the defendant was on the basis of '**First come first served basis**'. It was the position of the witness that according to the defendant the sugar was due for export beginning 01.03.2007 and not before yet the plaintiff's sugar had landed by the 27.02.2007 before the due date and that on 08.03.2007 the process of release was stopped by the defendant on the basis of conflicting information and directions from different sugar stakeholders to enable clarification be obtained from the ministry concerned. Owing to that delay, the quota of the COMESA sugar was exhausted before the plaintiff's sugar could be released and it took the court of appeal order for the sugar to be released.

11. In cross examination the witness confirmed that there was indeed permission to import some 89,000 MT of sugar to be imported zero rated and that the regulator and facilitator of that process was the Kenya Sugar Board, who had licensed the plaintiff, and not the defendant. She also made the concession that there was failure to release the sugar on the basis of demand for taxes and that even after the decision by the court there was more delay before the subsequent release even though the defendant was always represented in court and was aware of the order. She added that when sugar was held in a customs warehouse charges accrued and the same were payable by the plaintiff as the importer and that even though the Authority could waive warehouse rent no waiver was made with respect to the suit sugar. She further confirmed that the sugar was stored at a CFS which charged storage and that there was demurrage due on delayed container but that the goods could have been released on a bank guarantee which the plaintiff did not avail.

12. In their written submissions filed and later highlighted the plaintiff took the position that issues for determination must arise out of the pleadings filed and identified some six issues as needing determination by the court and then offered submissions aligned to the issues. The submissions were, therefore, that it was the duty of the Kenya Sugar Board and not the defendant, as confirmed by DW1 in her evidence, to regulate the importation of sugar in terms of section 27 of the Sugar Act a fact settled by the court of Appeal in **Transouth conveyors ltd vs KRA (2008) eklr**. There were also submissions that the plaintiff was indeed issued with import permit and did land the sugar in Kenya on the basis of authority of the regulator and that the decision not to treat the sugar as zero rated was quashed by the court of appeal in favour of the plaintiff. The decision in **Trade Bank Ltd vs LZ Engineering Construction Ltd (2000) 1EA 266**, was cited for the position of the law that the doctrines of estoppel and res-judicata bar litigants from re-litigating a matter already ruled upon by the court. On the basis of determined wrongs by the defendant, the plaintiff submitted that I had proved its case to the requisite standards and was thus entitled to the remedies sought. It prayed that judgment be entered for him as prayed in the plaint.

13. The Defendant in their submissions took the position that at no particular time was the Plaintiff's sugar consignment detained by the Defendant because no seizure notice was ever issued by the Defendant to indicate the same. The Defendant claim that the sugar was placed at a customs warehouse awaiting clearance after the Plaintiff failed to pay the duty demanded. The defendant took the difficult stand that the decision of the court of appeal relied on did not assist the plaintiff because it was grounded on different set of facts leading to quashing of the decision of the defendant to levy duty on sugar while the decision affecting the plaintiff's sugar had not been quashed. The defendant cited to court the decisions in **treadsetters tyres ltd vs Wepukhulu (2010)eklr** and **Nickson Muthoka Mutavi vs Kenya Agricultural Research institute (2016)eklr** as well as **sections 107 and 109 of the Evidence Act** were cited to the incidence and burden of proof it being asserted that the plaintiff had failed in his onus to prove the case.

14. The circumstances leading to withholding of the sugar was revisited with an argument that the actions by the defendant were reasonable in that there was no guarantee that the plaintiff's sugar would have fitted within the quota due for importation.

15. On the damages pleaded, the defendant took the position that the same were remote while citing to court the decision in **Johnson Mugwe Wanganga vs Joseph Nyaga (2014)eklr** that when damages are remote the same are irrecoverable. On claim for loss of business opportunity and lost profits, the defendant cited to court the decisions in **Kinuthia vs Unga (2006)eklr** where a similar claim was dismissed on the basis that the plaintiff had not proved the ability to perform the subject contract further reliance being placed on the decision in **Capital Fish Ltd vs Kenya Power and Lighting Company limited (2016)eklr** for the finding that a court cannot award special damages when only abstract figures are thrown at it. The last aspects of the defendant's submissions was that the plaintiff did not meet the duty to mitigate losses and that the pleadings were very imprecise and cited the decisions in **African Highland Produce Ltd vs Kisoria (2001)1 EA** and **wepukhulu's case (supra)**

Issues, Analysis and determination.

16. I have carefully considered the plaintiff's claim as pleaded, the defence on record and the evidence in the documents produced as exhibits. I have also considered both parties' advocates submissions as supported by the cited decisions.

17. The question of whether the Defendant wrongfully withheld the Plaintiff's sugar consignment is not for this Court to deal with since that was fully and exhaustively determined by the Court of Appeal in its Judgment delivered on 30th May, 2008 Consolidated Civil Appeal No. 89 & 92 of 2007. That judgment resulted in an order being extracted in Civil Appeal No. 231 of 2007 and dated 1st December, 2008. The order compelled the Respondent to *"forthwith release the sugar consignment for the Appellant free of all charges and duty in terms of Gazette Notice No. 296 of 2007"*. There was an attempt by the defendant in their submission to dismiss that judgment as not being applicable to this case but I can only say that such submission is one of those thrown at the court with the hope that the court's vision and appreciation would be blurred or just unfairly prejudiced. In sincerity, an advocate being an officer of the court is duty bound to avail true fact and state the true position of the law even if that be not in support of his client's case. And it must be born in mind always that submissions should be limited to the facts as applied to the applicable law but should not be employed to misrepresent the evidence led at trial. Submissions are the views of the counsel making them and never of any probative value. They are ideally intended to assist the court reach a just decision, not to mislead it, by counsel availing to court the law that most closely govern the dispute.

18. In this matter I consider the submission of the defendant to be misleading because there is availed to court, without protestation, a judgment in CACA No,89 Of 2007 which was pleaded at paragraph 10, to have been agreed by parties before the court to bind CACA no. 213 of 2007. There was also a duly extracted order in CACA no.213 of 2007 in terms of the same judgment. In her evidence, Dw1 said that **'the plaintiff sued the authority in court and went to the court of appeal and got the orders sought'**. It cannot be for this court in these proceedings to seek to question or permit the orders of the court of appeal to be questioned. One may be reminded that in 2008, that court was the apex court in the land and its determination was final and incapable of being questioned unless by the then limited window for review.

19. That aside, I do find that the importation of the sugar, failure by the defendant to release same on the basis of demanded duties and resolution of the dispute by the court of appeal are all common ground and invite no determination by the court. What therefore remains for the courts consideration is whether any injury and damage was suffered and the extent of that injury when measured in monetary terms. In coming to this conclusion I have given due regard to the evidence led and documents produced as well as the issues crafted and filed by the defendant beforehand as well as those identified by the plaintiff in its written submissions. Having done so, I do consider that the issues that stand out for the court's determination are:

- i. Whether the damages and losses pleaded arise out of the actions of the Defendant?
- ii. Whether the Plaintiff is entitled to the damages sought.

20. On whether the damages and losses pleaded arise out of the actions of the Defendant, the Plaintiff takes the position that pursuant to the of the court of appeal dated the 30th May, 2008 in Civil Appeals No. 89 & 92 of 2007, whose decision was on the consent of the parties made to bind and apply to Civil Appeal No. 231 of 2007, the Defendant was found to have been on the wrong and mandatorily obligated to forthwith release the Plaintiff's consignment duty-free without any further delay. The Plaintiff claims that it took up to 19th December, 2008 for the said consignment to be released which was a further delay of more than six and a half (6 ½) months from the date of the aforementioned judgment. The Defendant on the other hand argued that the delay in releasing the Plaintiff's consignment was occasioned by the suspension of clearance of all sugar imports imported into the country during the 2007/2008 duty free sugar quota. The Defendant further claims that upon resumption on 16th of March 2008, clearance was done on a first come first serve basis. Unfortunately going by the first come first serve basis, the sugar quota was exhausted before the Plaintiff's consignment was arrived at.

21. In my view, even though the suspension of clearance of the imports could have been necessary to allow the Defendant time to seek clarification from the ministries of Agriculture and Finance and the Kenya Sugar Board, that should not have been tied to the litigation. As it were, it appears that the defendant was not intent on changing its position in seeking to have control over the sector which was outside its mandate. Moreover, even after the court delivered itself on the matter the release was still resisted for more than six months. As a consequence, the Plaintiff inevitably suffered the injury and losses owing to being denied access to the merchandise to enable it run its business. It would appear what the court of appeal had baptized *sugar wars* was not to see a cease fire soon. I consider it not expected of a public institution like the defendant to act in an injurious way against any citizen whose ease of doing business should be the constant prayer for all so that we grow businesses, expand the tax yields and grow our economy. It is not enough that there could have existed administrative issues between the Defendant and the Kenya Sugar Board. The defendant was duty bound to just do its bit and let the other agencies also execute respective mandates. When their now determined wrongful act visits an injury on a citizen it is only just that the defendant remedies that injury. I do find that the defendants conduct was wrongful and injurious to the plaintiff resulting in financial losses to the plaintiff.

22. On whether the Plaintiff is entitled to the damages sought being special damages as well as exemplary damages, I appreciate the law to be that damages are awarded to assuage a wrong committed against the victim of the wrong, that special damages must not only be specifically pleaded but also strictly proved, exemplary damages target to inflict a punishment on the wrongdoer and that assessment of damages is at the discretion of the court. In **Treadsetters Tyres Ltd v Wepukhulu's** the court stated that:-

"The party seeking to recover compensation for damages must make out the party against whom he complains was in the wrong. The burden of proof is clearly upon him and he must show that the loss is to be attributed to the negligence of the opposite party. If at the end he loses the case in even scales and does not satisfy the court that it was occasioned by the negligence or default of the other party, he cannot succeed."

23. In awarding exemplary damages. Maraga, J as he then was held in **ABDULHAMID EBRAHIM AHMED VS MUNICIPAL COUNCIL OF MOMBASA [2004] eKLR:-**

"Exemplary damages on the other hand are damages that are punitive. They are awarded to punish the defendant and vindicate the strength of the law. They are awarded in actions in tort, and only in three categories of cases. The first category relates to the oppressive, arbitrary or unconstitutional actions of servants of government. The other two categories are where the defendant's conduct is calculated to earn him profit and the third one is where exemplary damages are expressly authorized by statute"

24. In my view, the plaintiff did not demonstrate that it fell within any of the situations contemplated above to justify an award of punitive damages as against the Defendant. Thus the claim for an award of exemplary damages fails.

25. The Plaintiff also prayed for special damages then led evidence in proof thereof by the two witnesses who gave evidence. In this matter I am satisfied that the claim for special damages was sufficiently pleaded and cannot be faulted on that account. What the court must determine however is if the sum pleaded was strictly proved to the requisite standards. Does the need strict proof impose a demand for proof beyond the ordinary civil standard of within a balance of probabilities? The Court of appeal in **Richard Okuku Oloo – v- South Nyanza Sugar Co. Ltd [2013] eKLR** did settle that question when it said;-.

“... a claim for special damages must indeed be specifically pleaded and proved with a degree of certainty and particularity but we must add that, that degree and certainty must necessarily depend on the circumstances and the nature of the act complained of.”

26. The Plaintiff calculated Its special damages to be majorly arising from interest on letters of credits taken out for the sugar consignment, financial cost on opening of letters of credit, Extra storage charges at Mitchell Cotts Freight Kenya Limited, loss of business opportunity as well as loss of profit. In support of its case, the Plaintiff called one Abdulhalim Said Omar as PW-2, a certified accountant, who testified as to the extent of losses incurred by the Plaintiff between 2nd March, 2007 and 19th December, 2008 when the Plaintiff’s consignment was released. The Defendant in my view did not meaningfully challenge that witness on his evidence and calculation. In my assessment having observed and heard the witnesses testify, I am persuaded and convinced that the calculations were by an expert, which even though never binding upon the court, was cogent and persuasive are very credible. I therefore find that the Plaintiff sufficiently proved that as a result of the wrongful conduct by the defendant, its operations were disrupted, it was exposed to both business losses in anticipated profits as well as additional storage charges and financial costs

27. The upshot is judgment is entered for the Plaintiff against the Defendant for the sum of USD 1,132,460.45 and Kshs. 405,108,353.30 as special damages with interest thereon at Court rates from the date of filing suit until payment in full. The Plaintiff shall also have costs of the suit.

Dated, signed and delivered this 5th day of May 2020.

P J O Otieno

Judge