REPUBLIC OF KENYA

HIGH COURT AT NAIROBI (NAIROBI LAW COURTS)

CIVIL CASE 206 OF 2012

POWER SOLUTIONS LIMITED.....PLAINTIFF

VERSUS

CMA CGM KENYA LIMITED .....1ST DEFENDANT

AWANAD ENTERPRISES LIMITED.....2ND DEFENDANT

KENYA PORTS AUTHORITY .....3RD DEFENDANT

J U D G M E N T

1. By its plaint dated the 17/7/2012, amended on 21/8/2014, the plaintiff pleads that it procured goods and fully paid for them from **Zheng Zhou Cable Company Limited** in the People's Republic of China. The consignment comprising of five containers containing cables was loaded onto a maritime vessel belonging to the 1st Defendant and a bill of lading issued to that effect. The ship docked at the port of Mombasa on or about 29/4/2012 and the 1st Defendant's charges were settled and M/S. Kodiak Logistics Limited was appointed as the Plaintiff's clearing agent.

2. The dispute arose when the Plaintiff's agent was informed by the 2nd Defendant that its consignment was not part of the consignment nominated to it and communicated by the in the manifest pages given to it by the 1st Defendant and was thus not transferred to its container freight station(CFS) and therefore no arrangements had been made to pick the Plaintiff's container from the port and transfer it on time to the CFS for clearance. Consequently, by the time the consignment was being transferred, it had already incurred storage charges payable to the 3rd defendant and charged to the 2nd Defendant.

3. On those pleaded facts, the plaintiff sought the following orders:

a. **A declaration that the Plaintiff is not liable to pay storage charges to the Defendants.**

b. For permanent injunction to restrain the Defendant from alienating, dealing with, retaining, holding or remaining with the Plaintiffs consignment comprising of five containers.

c. General damages for wrongful detention and delay in the delivery of that consignment.

d. Compensation for the full contract value of the consignment being US Dollars 700,000.

4. When served, the 1st Defendant filed a statement of defence on the 13/11/2013 denying all the allegations in the plaint save for the descriptive paragraphs 1, 2, 3, & 4. Even the particulars of negligence, loss, and damages were denied and strict proof invited. The 1st Defendant stated that it only had a contract with the shipping line and therefore, it was not its duty to supply the 2nd Defendant with the manifest as the same had been supplied to the 3rd Defendant by the shipping line prior to arrival of the vessel at the port of Mombasa. The 1st Defendant further pleaded that it is the sole responsibility of the 3rd Defendant to nominate a CFS, but that it did not nominate any CFS and it is yet to receive its containers from the Plaintiff which are incurring demurrage charges at the rate of US$14 per day.

5. The 2nd Defendant on its part filed an amended defence and counterclaim dated 6/3/2014 denying all the allegations in the plaint save for the descriptive paragraphs 1, & 2. Even the particulars of negligence, loss, and damages were denied. The 2nd Defendant stated that the 1st Defendant failed in its duty of informing the 2nd Defendant of the arrival of its consignment at the port by not delivering the relevant manifest to it in order to facilitate timely transfer of the goods from the port to the CFS. By the time it was transferring the containers to the CFS, they had incurred port storage charges of **US$ 3,650/=** which was debited against its account before the release of the container to it.

6. The 2nd Defendant further states that in an attempt to have the storage charges waived, it wrote to the 3rd Defendant explaining the delay but the 3rd Defendant only waived 30% of the accrued storage charges and the difference was payable within 7 days. The Plaintiff refused to mitigate its loss by paying the storage charges to facilitate clearance of the cargo from the port and that as at the time of filling of the defence, the Plaintiff owed the Plaintiff Kshs. 7,900,470/= in storage and handling charges.

7. In its counterclaim, the 2nd Defendant stated that since 22/5/2012 the containers have continued to incur storage and handling charges, and Value Added Tax payable to it and that as at 31/1/2014, the total sum payable by the Plaintiff herein was Kshs. 15,088,410/=which amount continues to increase each day the subject containers remain uncollected at the rate of US$ 261 per day. The 2nd Defendant sought Judgment to be entered against the Plaintiff as follows:

a) Kshs. 15,088,410/=together with a further US$261per day as from 1st February 2014.

b) Costs and interest on (a) above.

8. The 3rd Defendant on its part filed a statement of defence dated 2/10/2012 denying all the allegations in the plaint save for the descriptive paragraphs 1, 2, 3, & 4 and paragraph 12. Even the particulars of negligence, loss, and damages were denied. The 3rd Defendant stated that there is no reasonable cause against it, since, the documents in the Plaintiff's list of documents points to a dispute between the Plaintiff and the 1st and 2nd Defendant.

9. In support of its case, the Plaintiff called **Managing Director to Kodiac Logistics LTD Mr. John Waruhiu (PW1)** and the managing director to the Plaintiff Mr. **George Andy Hinga (PW2)** to prove its case. The 1st Defendant, on its part, relied on the evidence of its Legal Officer **M/s. CECILIA NDANO NDETI,** the 2nd Defendant relied on the evidence of ITS Operations Manager Mr. **Eric SAMBA** and the 3rd Defendant relied on the evidence of its senior commercial officer Mr. Oscar Magero. All the witness relied on and adopted their respective witness statements as evidence in chief and then produced the Bundles of Documents filed as exhibits.

Evidence led by the parties

10. The hearing of the suit commenced on the 24/5/2016. On that day **PW1 John Waruhiu** who is a logistics solutions provider adopted his witness statement dated 7/9/2012 and relied on it as his evidence in Chief. He testified and said that he was contracted by the Plaintiff to handle the importation and delivery of the entire consignment to Kenya Power & Lighting Company Limited. To execute his duties, he was issued with an original bill of lading, a commercial invoice, a certificate of conformity and a packaging list. He produced a bundle of documents listed in the bundle of document as Plaintiff exhibit 2, 3, & 4 to that effect.

11. **PW1** states that a custom entry was generated containing the description of the goods, the name of the shipper, consignee, the arrival date of the consignment, the container number, the manifest number, and the tax collection amount after the aforementioned documents were lodged with the 3rd Defendant and a statutory declaration of the goods was made for tax purposes. They proceeded to pay the custom duties, thereafter lodged the bill of lading with the shipping line, and paid the charges. They were issued with a receipt and a delivery order on the 16/5/2012, which was to expire on the 29/5/2012 and advised to collect their consignment at the 2nd Defendant CFS. He produced a bundle of documents listed in the bundle of document as Plaintiff exhibit 5 and 7.

12. PW1 states that they did not find their consignment at the 2nd Defendant CFS and they kept checking daily until on or about the 21/5/2012. The consignment was then verified and they proceeded for customs release in the Simba system and thereafter, they obtained a release order and proceeded to the 2nd Defendant CFS to pay the port handling charges without any further delay, only to be hit with a bill worth Kshs. 500,000/=. The Plaintiff was made aware of the astronomical charges and the options available to it. The Plaintiff opted to dispute the said 2nd Defendant's charges and to write to the 2nd Defendant seeking a review of the said charges. PW1 further states that to date, the containers are being unreasonably held by the 2nd Defendant and continue to accrue further charges because of a fault that was not the Plaintiff's making.

13. On cross-examination by **Mr. Wameyo advocate**, for the 1st defendant, PW1 stated that he was the managing Director of Kodiak Logistic Ltd and they were the ones who appointed the clearing agent and that it was the clearing agent, one **Peter Kiarie** who was informed that the consignment had not been disclosed in the consignment in the manifest and that the 1st Defendant never notified the 2nd Defendant of the arrival of the consignment.

14. PW1 also confirmed that he was not personally present during the clearance of the consignment but his clearing agent who is not a witness in this suit informed him that the consignment was not captured in manifest submitted by the shipping line and that the manifest was supposed to be lodged electronically by the shipping line with KRA SIMBA SYSTEM and only available to the public once KRA issues a manifest number and only KRA, the 3rd Defendant and the clearing agent had access to the Simba system. He also confirmed that the manifest was approved on the 22/4/2012 and the vessel docked on the 29/4/2012.

15. PW1 confirmed that they did not clear the goods because they were not available for clearance since they were not on the manifest; they did not know who nominated the 2nd Defendant and that a shipper's responsibility ended the moment the goods landed at the port of discharge and that the Plaintiff was advised to take advantage of waiver by the 3rd Defendant waiver for the purposes of decongesting the port.

16. On cross-examination by **Mr. Amuga advocate, PW1** stated that he did not know who was to avail the manifest to the 2nd Defendant but it is them who informed the 2nd Defendant that the consignment had been nominated to them as they had not been furnished with the relevant manifest and upon the manifest being availed too them, the goods were traced, a sum of US$ 3,650/= paid and the containers

removed from the port within 5 days. Pw1 further confirmed that they were unable to retrieve the consignment as the Plaintiff refused to pay the alleged storage charges incurred.

17. On cross-examination by **Mr. Sangoro advocate**, for the 3rd defendant, PW1 stated that they were informed by the 2nd Defendant that the subject consignment was not manifested in the manifest provided to it by the shipper and by the time the containers were discovered, the 4 days' grace period had expired and it was very difficult to assign blame.

18. On being questioned by this Court, PW1 stated that the 3rd Defendant may have been under a duty to notify the CFS and that without waiver of the charges or payment, the 2nd Defendant cannot release the containers.

19. PW2 **George Andy Hinga** the Managing Director to the Plaintiff adopted his statement dated 7/9/2012 as his evidence in Chief. He testified that he won a tender with KPLC to supply wires and hired PW1 to handle the logistics of importation of goods on their behalf with full authority. At the time the consignment landed, they were in a position to pay all the requisite charges but the consignment could not be traced. He therefore registered his complaint with the 1st and 2nd Defendant regarding the delay in locating the consignment that resulted in accrual of demurrage charges on the 25.5.2012.

20. He further stated that the 1st and 3rd Defendant were willing to release the consignment to the Plaintiff by consent but the 2nd Defendant objected to the said release as it insisted on recovering charges paid to the 3rd Defendant . He further stated that the 2nd Defendant's counterclaim was not merited and ought to be dismissed.

21. In cross examination, he confirmed that he received the original bill of lading, certificate of conformity commercial invoice and packaging list on the 19.3.2012 and the problems arose after his agent was issued with a delivery order issued on the 16.5.2012 and all taxes paid by the 12.5.2012 as the Plaintiff could not clear the goods before payment of customs duty and that nothing could have stopped the clearing agent from clearing the consignment before the 15.5.2012 when all the 1st Defendant dues had been paid.

22. PW2 further admitted that he was to clear the goods within four days without attracting any port handling charges but he could not clear the same without a delivery order. He further confirmed that charges for the consignment started accruing on the 3.5.2012 and the contract with KPLC he produced in evidence was worth US$ 516,829.25 but it was neither dated nor signed.

23. On being questioned by the Court, PW2 stated that the period it disputed was up to the 22.5.2012.

Evidence by the 1st Defendants

24. **DW1, M/s. Cecilia Ndano Ndeti** also adopted her statement filed in court on 24.5.2016. She testified that the shipping line was required to transport the cargo to the port of delivery, issue a cargo manifest, hosted and found on the KRA Simba system, at least 48 hours prior to the arrival of the ship, and to notify the consignee of the arrival of its consignment so that the requisite taxes and charges are paid and a delivery order is issued to enable the consignee to collect the cargo. She said that in this instance KRA was notified and the same registered on the 20.4.2012. That the notification was sent to several people including the 2nd Defendant and that the shipping line is only obligated to notify KRA only and not any other person.

25. DW1 further testified that prior to the ship's arrival, a manifest and a loading list is issued to the 3rd Defendant and the consignee comes for the goods once they have a custom entry and paid all the requisite taxes together with the shipping line charges. She insisted that the 1st Defendant did not wrongfully detain the plaintiffs consignment from the moment it was issued with a delivery order, the Plaintiff was free to pick his consignment.

26. On cross-examination, DW1 confirmed that the Plaintiff performed all its obligations and once the consignment was discharged it was the statutory duty of the 3rd Defendant to ensure that the consignment was delivered to the Plaintiff and she was not aware whether the Plaintiff was notified of the ship's arrival and that each of the Defendants had a duty owed the Plaintiff. She confirmed that a letter from Kenya Maritime Authority blames the 1st and 2nd Defendant for the delay in clearing of the container.

27. DW1 further confirmed that it was the duty of the consignee to return the containers within a specific period and delay attracts charges but they have never formally demanded the return of the said containers as she is aware that the containers are detained by the 2nd Defendant and that the 1st Defendant has not filed a counter-claim.

28. In cross-examination, DW1 confirmed that she joined the 1st Defendant in August 2015 and that the ship docked on the 27.4.2012. She said that the consignment was transferred to the 2nd Defendant on the 22.5.2012 but she could not exhibit the entire manifest to Court. It was her further evidence that, the 2nd Defendant would not have known the consignment was nominated to if it did not have the entire manifest. She however, asserted that the allegation that some pages of the manifest were missing is misleading since it was on the basis of the same manifest that taxes were paid to KRA though she could not dispute the assertion that the 2nd Defendant received an incomplete manifest.

29. She went on to state that customs duties cannot be paid without a manifest and that by the time the Plaintiff agent was paying for duty he must have accessed the manifest as it was lodged with KRA before arrival of the consignment at the port of discharge and that the shipping line responsibility ends when the consignment lands at the port of discharge.

Evidence by the 2nd Defendant

30. **Mr. Eric Samba, DW2,** adopted his statement filed in Court on the 14.9. 2016 as his evidence and went ahead to testify that the cause of the delay in removing the consignment was caused by the failure of the 1st Defendant to furnish them with a complete manifest and that the consignment is still at the 2nd Defendant's premises as they have counter-claimed **kshs. 15,088,400** as at March 2014, which continues to accrue at **US$ 261** per day and that at the time of hearing their Counter-claim stood at **Kshs. 43,000,000/=** which ought to be paid before the goods are released to the plaintiff.

31. In cross-examination, DW2 confirmed that he was employed by the 2nd Defendant in the year 2013 and he did not get an opportunity to look at the documents before making his statement. He further stated that they cleared the goods on behalf of the Plaintiff after receiving a manifest containing a list of consignments nominated to them by the 3rd Defendant via email and it is only the shipping line and CFS that are privy to the manifest detailing specific goods assigned to a particular CFS and that both are not obliged to inform the consignee of arrival of its consignment.

32. He added that all the demurrage charges were paid by the 2nd Defendant on behalf of the Plaintiff and that there was 100% waiver of port charges in 2016 and from the additional document by the Plaintiff it is indicated that the Plaintiff applied for a waiver. He further confirmed that there is no demand for storage charges but the 2nd Defendant relied on the tariffs by the 3rd Defendant.

33. DW2 also confirmed that by the time the consignee approached the 2nd Defendant, all the requisite taxes had been paid and the consignee did not State why it did not come for its consignment earlier and since all the taxes were paid by the 15.5.2012, reflecting a delay for the period between 16.5.2012 and 22.5.2012.

34. DW2 further confirmed that they sent somebody to get copies of the manifest from the shipping line but the manifest in their possession did not contain the suit consignment and that had the Plaintiff not followed up on the consignment, the 2nd Defendant would not have learnt of the existence of the cargo at the port.

Evidence by the 3rd Defendant

35. **Mr. Oscar Magero, DW3,** adopted his statement filed in Court on the 9.10.2012. He testified that he received a letter from the 2nd Defendant requesting for a waiver of storage charges which resulted from an error by the 1st Defendant, the charges were around US$ 3650/= and a 30% waiver was granted by the waiver committee. He added that another request for waiver was made by Kenya Power, it was granted then cancelled when it was discovered that the initial waiver was still in place.

36. In cross-examination, DW3 stated that the port charges accrue after 4 days after the last cargo leaves the ship and that in this case the delay was between the shipping line and the CFS. He further confirmed that there was a Government directive that all the storage charges be waived on consignments which arrived at the port before 30.11.2014.

37. The last witness was **Brigita Mbithe Kasango, DW4**, also adopted here statement filed in court on the 9.10.2012. She testified that her general duties included receiving electronic Data Interchange (EDI) from KRA and the shipping line. The documents received include the stowage Bay Plans (from the shipping line, which is uploaded manually into the 3rd Defendant's operations system and the customs cargo document (CUSCAR) received from KRA and automatically maps into the system. The two documents are then reconciled to enable the client do documentation required for them to clear cargo and for the 3rd Defendant to secure the relevant charges. The said reconciliation was done on the 22.4.2012 which was the day the vessel arrived and the 2nd Defendant collected the manifest from the shipping agent. A total of 393 containers were allocated to the 2nd defendant. The transfer to the 2nd Defendant was however done on the 22.5.2012.

38. In cross-examination, DW4 confirmed that the shipping line was blamed for the delay by the 3rd Defendant vide letter dated 21.6.2012 and that the Plaintiff agent ought to have tracked the consignment and established were the problem was instead of doing so late. She further confirmed that she has not come across any letter by the Plaintiff complaining about inability to trace the cargo and that the cargo can be transported to the CFS before payment of duty but the cargo cannot be released to the importer.

39. In re-examination, DW4 stated that the shipping line lodges a manifest with KRA through manifest Management system and when approved it maps automatically into the 3rd Defendant's system and becomes **CUSCAR** which lands into (catos) container automated terminal operation system which is then compared with (**BAY PLAN**) and after reconciliation, the CFS and the clearing agent see the documents in the system. Since reconciliation of the subject consignment was done on the 22.4.2012, the cargo was visible in the system and therefore the Plaintiff's container had no issues, and documentation should have been done by the 2nd Defendant.

Issues, analysis and determination

40. Having perused the evidence above in line with the pleadings filed, read the submissions offered by both parties and the law cited as well as the agreed issues drawn by the parties, I have isolated the following issues as falling for determination by the court.

1. Whose breach of duty culminated in the delay in clearing the consignment?

2. Was the 2nd defendant entitled in law to insist on payment of its expenses prior to release of the cargo?

3. Did the plaintiff answer to its duty and obligations to mitigate probable losses

4. Whether the Plaintiff is deserving of the prayers sought in the plaint

5. Whether the 2nd Defendant has proved Its Counter-claim

Whose breach of duty culminated in the delay in clearing the consignment?

41. It is not in dispute but common ground that the cargo was safely delivered to the 3rd Defendant and that the 1st Defendant did promptly issue a delivery order to the Plaintiff on the 16/5/2012 upon payment of all its charges. It is also common ground that the 2nd Defendant is an agent of the 3rd Defendant and that both of them blame the Plaintiff and the 1st Defendant for the delay in the removal of the subject container from the port to avoid the accumulation of storage charges. The 2nd Defendant submits that the Plaintiff is responsible for the delay as the consignment was discharged at the port on the 29/4/2012 and the Plaintiff only paid duty to KRA on the 12/5/2012 knowing very well it had a grace of only 4 days to remove the containers from the port or else the same would commence attracting storage charges. The grace period was due to end on the 3/5/2012. Therefore, by the time the Plaintiff was paying the requisite duty to KRA, the containers had already incurred substantial storage charges and continued to incur further charges until 22/5/2012 when it eventually removed the containers from the port to its storage.

42. As for the delay between 12/5/2012 to 22/5/2012, the 2nd Defendant submitted that the 1st Defendant failed in its duty of alerting it of the arrival of the container and availing the relevant manifest to it and as a result, there was a delay. The 2nd Defendant submits that it got information on the subject containers on the 21/5/2012 and it removed them from the port on the 22/5/2012 after paying all the storage charges that had accrued.

43. On the part of the 3rd Defendant, it was submitted that DW3 had confirmed the Electronic Data Interchange (EDI Manifest) relating to the subject consignment was never received from the 1st Defendant as it had been omitted from the ones received on the 22/4/2012. Therefore, the information was loaded on the 18/5/2012 and the 3rd Defendant uploaded the information on the 22/5/2012. The 3rd Defendant further submitted that the law sets an obligation on the 1st Defendant to provide the EDI manifest to KPA and KRA.

44. The 1st Defendant through DW1 confirmed that the Manifest was registered on the 20/4/2015 and approved by KRA on the 22/4/2012 and allocated a manifest number 102762. An email containing the manifest number 102762 was forwarded to the 2nd Defendant on the 20/4/2012 who only offered to assist the addressees of the mail in the confirmation of the clearance point and location of dangerous cargo. At the end of adduction of evidence there was no material in proof that the 1st Defendant owed any of the parties herein a contractual duty to deliver hard copies of the cargo manifest after the ship docked in Mombasa. All that was proved was that the 1st defendant needed to lodge the document with the 3rd defendant after which the document became public to all those with the requisite access to the 3rd defendant's system. This means that the manifest became a public document that could be accessed by all the persons who use the KRA Simba System namely the Kenya Revenue Authority, the 3rd Defendant, the shipper and the Plaintiff through its clearing agent. Consequently, the Plaintiff through its agent had full access to the cargo Manifest by the 22/4/2012 and there was nothing stopping the Plaintiff is clearing agent from paying the duty and clearing the cargo in due time.

45. The Hamburg Convention disposed of the long list of exceptions, which have hitherto shielded a carrier, and laid it down that the carrier is liable for loss attributable to his fault or the fault of his servants or agents. Article 5(1) states the position affirmatively as follows: -

> ***"The carrier is liable for loss resulting from loss or damage to the goods, as well as from delay in delivery if the occurrence which caused the loss, damage, or delay took place while the goods were in his charge as defined in this Article unless the carrier proves that he, his servants, or agents took all measures that could reasonably be required to avoid the occurrence and its consequence".***

46. In Kenyan statutory set up, it is the duty of a Master to supply information to the 3rd Defendant. Section 38 of the Kenya ports Authority Act provides as follows: -

> ***"The master of any ship arriving in a port shall, if required, produce to an authorized employee—***
>
> ***(a)…***
>
> ***(b) …***
>
> ***(c)..***
>
> ***(d) …***
>
> ***(e) and shall also supply such other information in relation to the ship, passengers and cargo thereof, as such employee may require."***

47. In addition Section 16 of the East African Harbours Regulations 1970 on notification of expected arrival of ships provides as follows:

> ***"The owners or agents of a ship proposing to call at a harbour shall `as early as possible give notice in writing to the management on the form prescribed in schedule A hereto of the expected date and time of arrival of the ship, and shall give***

particulars in such notice of the nature and quantity of cargo to be loaded and/or discharged and other matters of importance."

48. The 1ST Defendant has produced in evidence an extract of KRA Manifest Management System which showed that indeed the 1st Defendant registered the subject manifest with KRA on the 20/4/2012 and was issued with a manifest No. 10272, the same was approved on the 22/4/2012. Secondly, in his testimony, DW4 told the court that once the shipping line lodges a manifest with KRA through (manifest Management system) and when approved it maps automatically into the 3rd Defendant's system and becomes CUSCAR which lands into the container automated terminal operation system (**CATOS**), which is then compared with (BAY PLAN) and upon reconciliation, the CFS and the clearing agent see the documents in the system. Since reconciliation of the subject consignment was done on the 22.4.2012, the cargo was visible in the system and therefore the Plaintiff's container had no issues and the 2nd Defendant should have done documentation earlier than the 22/5/2012 by which time the consignment had accrued storage charges. I do find that it was the failure by the plaintiff to utilize the grace period to clear the cargo that led to the cargo incurring the port charges

49. On cross-examination by **Mr. Sangoro advocate**, DW2 stated that the 2nd Defendant gets to know the exact number and details of containers assigned to it once it gets hold of the manifest and in this particular case they sent somebody physically, who brought them pages of the manifest which did not contain the suit consignment and that had the Plaintiff not followed up, they would have never learnt of the existence of the container at the port.

50. PW1 confirmed DW2's statement, as he stated that when he sought the whereabouts of the consignment from the 1st Defendant he was informed that the container had been transferred to the 2nd Defendant's CFS. When PW1 visited the 2nd Defendant's CFS, he was informed that informed that the Plaintiff's consignment was not part of those in the manifest pages obtained by the defendant and therefore no arrangements had been done to collect the plaintiff's consignment by the 1st Defendant.

51. From the foregoing, I find that the 1st Defendant indeed discharged its duty by sending a copy of the manifest electronically to KRA on the 20/4/2012 when it was registered, issued with a manifest number, and approved 22/4/2012. A reconciliation of the manifest was undertaken on the same 22/4/2012 and the 2nd Defendant and the clearing agent were able to see it in their system and since the containers had to issues, it was the duty of the 2nd Defendant to request for the release of the good using the soft copy of the manifest lodged by the shipping line. Instead of adopting that otherwise efficient and verifiable source of documentation, the 2nd defendant in this case opted to send a person whose identity was not revealed and kept secret to the 1st Defendant's office to collect a hard copy of the manifest which it later alleged was not complete as some pages of the manifest were missing.

52. From the evidence gathered on cross-examination of DW2, by **Mr. Sangoro**, I note that the unidentified person who went to pick a copy of the subject manifest admitted to only photocopying the relevant part of the manifest he deemed was relevant and relating to the 2nd Defendant and therefore he did not obtain a complete manifest from the 1st Defendant. Secondly, the 2nd Defendant has not furnished this Court with a copy of the incomplete manifest it alleges was issued to it by the 1st Defendant. It is my view that the Act of photocopying only what the unidentified person considered relevant of the manifest and not obtaining the complete manifest demonstrates lack of diligence if not outright negligence on the part of the 2nd Defendant.

53. The applicable law as to the burden of proof is found in Section 107 (1) of the Evidence Act, which states that:

> **"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."**
>
> Section 108 further provides that:
>
> > **"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."**

54. After full review of the evidence availed and the claim as pleaded against all the defendants, I find and hold there has not been fault established against the 1st & 3rd defendants and that even it was the 2nd Defendant duty to ensure that the Plaintiff's container was timely removed from 3rd Defendant's port and transferred to its CFS was not diligently discharged the bigger duty was upon the plaintiff as the consignee and the person with title to have the good cleared with speed to avoid possible bottlenecks and resultant but avoidable port charges like those occasioned by delayed removal. I therefore draw the conclusion that the delay leading to the disputed port charges was fully contributed to by the plaintiff and that any lack of diligence by the 2nd defendant had no tangible contribution thereto. I would therefore assign the liability for any injury and loss resulting from that delay squarely upon the plaintiff.

Whether the Plaintiff is deserving of the any of prayers sought in the plaint

55. The totality of the evidence on record is to the effect that the Plaintiff paid duty to KRA on the 12/5/2012 fully aware that the grace of 4 days to pay duty and clear the containers from the port before they started attracting storage charges had ended on the 3/5/2012. Further, the Plaintiff paid for all the 1st Defendant's shipping charges on the 15/5/2012 and was issued with a delivery order on the 16/5/2012 and was ready to clear its consignment. Therefore, by the time the Plaintiff was paying the requisite duty to KRA and being issued with a delivery order that entitled it to collect its consignment, the containers had already incurred substantial storage charges and continued to incur further charges until 22/5/2012 when it eventually removed the containers from the port to its storage. Such charges were due for payment before the cargo could be released to the 2nd defendant and I do find that having paid on the plaintiff's behalf the plaintiff had a right to lien over the goods till that payment was made or consensually secured.

56. Having found that the Plaintiff is liable for the delay leading to the disputed charges claimed and demanded by the 2nd defendant I further find that Plaintiff can therefore not be entitled to the equitable remedy of an injunction just as it cannot be get the declaration as to shield it from the consequences of its default by calling upon other parties to meet such consequences. That same finding also dictate the obvious finding that the 2nd defendant had a possessory lien over the goods entitling it to retain the possession till the lien is discharged. Accordingly, therefore, neither the claim for general damages for wrongful detainer nor the value of the entire contract can be in fairness be ordered in its favour.

57. The other reason the claim for compensation for the contract sum cannot succeed is the quality of evidence led. The only document produced to evidence the contract between the plaintiff and The Kenya Power and Lighting co Ltd was neither dated nor signed by the latter. it is to this court the kind of a document that cannot be the proof of an agreement upon which such a hefty loss can be founded.

58. There is a third reason the plaintiff cannot succeed in its prayer for general damages and value of the contract even if it had proved his loss and even if I had not found it to have been the author of his own losses. It is an established principle of law that every litigant making a claim is obligated to show that when confronted by the potential loss and damage, he took positive steps, within his ability, to mitigate such losses. **In *African Highland Produce Limited v John Kisorio [2001] eKLR*, the court of appeal reiterated the position in the following fashion: -**

> **"It is manifestly clear that the plaintiff did not take reasonable steps to mitigate the loss which he sustained consequent upon the accident. Being a man of considerable means he could have within 21 days, repaired his BMW car instead of incurring unnecessarily heavy hire charges. He did not act prudently. A prudent man would certainly not have acted in the way the plaintiff did. He acted, in our view, unreasonably".**

59. The evidence led by the plaintiff own witness, PW1, was that the plaintiff was given options including that of paying and disputing but he opted not to pay. Even when a partial waiver was granted he still refused to pay. The result is that the goods have remained with the 2nd defendant ever since occupying its storage space. I can only say that that conduct was not prudent nor businesslike. It is the kind of a conduct one would only expect of one with more interest in litigation than in the goods.

60. In effect, I find no merit in the plaintiff suit which I order to be dismissed with costs to be paid to all the defendants.

Whether the 2nd Defendant has proved Its Counter-claim

61. At paragraphs 15 and 17 of the 2nd Defendant's counter-claim a specific sum of Kshs. 15,088,410.00 is claimed being port, storage and handling charges and value added tax payable to the counter-claimant by the plaintiff as at 31.1.2014 as a result of the plaintiff's failure or default to pay the amounts owed since 22/5/2012. The said sum is pleaded and shown to escalate at the daily rate of USD 261 till payment in full and collection of the goods by the plaintiff. While I do not doubt that the counter-claimant is entitled to its storage charges, I am also aware that there was always a duty to mitigate losses. I have in mind the right created under the Uncollected Goods Act which the counter claimant ought to have employed, noting that as early as 01.11.2013, the court had declined to order the release of the goods and there was no injunction to restrain disposal to not only free the storage space but also recoup the sums claimed under lien, I hold that for failure to mitigate own losses, the counter-claimant should not be entitled to claim storage *ad infinitum* while ignoring the duty to mitigate such losses. I find that it is only just that he gets such charges as computed to be due as at 31.01.2014. In effect I do enter judgment for the 2nd defendant counter-claimant in the sum of **Kshs. 15,088,410.00** with interests from the date of counter-claim till payment in full. In addition, the costs of the counter –claim goes to the said counter-claimant.

Dated, signed and delivered at Mombasa this 15th day of May, 2020.

P J O OTIENO

JUDGE