



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

HCC NO. 521 OF 2005

HARSWELL TRADING COMPANY LIMITED.....PLAINTIFF

VERSUS

KENYA REVENUE AUTHORITY.....DEFENDANT

JUDGMENT

1. The claim by Harswell Trading Limited (Harswell) against Kenya Revenue Authority (KRA) is for a total sum of Kshs.14,093,516 plus costs and interest on the principal sum at 12% per annum from the date of filing suit until payment in full.

2. It is the case of Harswell that it lost goods in two containers designated as numbers AWSU 490055-6 and INKU 228084-6 while in the hands of KRA and asserts that the loss was occasioned by acts and/or omissions of the KRA, its servants, officers and/or agents. That following exchange of letters from KRA dated 15th September 2004 and 25th October 2004 and from it dated 9th October 2004 and 26th October 2004, it was agreed by the two parties that KRA would pay Harswell the sum of Kshs.10,471,061.00 as compensation.

3. That sum is said to be made up as follows:-

- i Loss of goods (containers No. AWSU 490055-6 and INKU 228084-6 -----Kshs. 3,150,000.00
- ii Loss of business -----Kshs. 6,210,000.00
- iii Telephone Expenses (UK) -----Kshs. 422,520.00
- iv Travel Expenses (UK to Kenya) -----Kshs. 287,980.00
- v Bank Charges -----Kshs. 9,660.00
- vi Legal Costs -----Kshs. 49,700.00
- vii Telephone Expenses -----Kshs. 22,000.00
- viii Travel Expenses -----Kshs. 42,000.00
- ix Subsistence Expenses -----Kshs. 176,000.00
- x Stall and guards -----Kshs. 69,000.00
- xi Bank charges -----Kshs. 9,156.00

4. A further claim of Kshs.3,622.500 is a made for loss of business which is worked at the rate of Kshs.345,000.00 per month. A rate, Harswell asserts, was specifically acknowledged by KRA.

5. In a Statement of Defence dated 24th November 2005 and filed on 25th November 2005, KRA resists the entire claim. KRA contends that

the letters referred to by Harswell were not capable of resulting into an enforceable agreement for various reasons. First, that it was understood between the parties that any negotiations and agreements would require to be authorized by the Board of Directors of KRA for it to have effect. Second, that the initial offer made by KRA was rejected by the Harswell and was no longer open for acceptance and any subsequent and/or purported acceptance of it by Harswell was invalid and of no consequence. In addition, that there was no consideration or valid consideration on the part of Harswell.

6. As an alternative, KRA argues that the agreement was procured through misrepresentation and undue influence by Harswell and was therefore incapable of enforcement. The particulars of misrepresentation and undue influence are set out in the Defence.

7. The alleged loss of goods by Harswell is denied and any liability to compensate the Plaintiff is similarly denied. KRA avers that, generally, it is not liable for loss or damages occasioned to goods deposited in a customs warehouse.

8. Only Harswell called evidence by way of testimony of Martin J. Linnell (PW1) and Benson Kairichi Marimba (PW2). Their evidence, in so far as is relevant to resolving the issues for determination, are discussed in this decision. As to the issues, the same were agreed by the parties to be as follows:

1. Whether the suit is bad and should be struck out for being time barred.
2. Whether the suit is in any event fatally defective.
3. Whether the exchange of correspondence between the Plaintiff and the Defendant by letters dated 15th September, 9th October, 25th and 26th October 2004 were capable of resulting into an enforceable agreement.
4. Whether the contract, if any, is void or voidance for lack of consideration, misrepresentation, or undue influence.
5. Whether the Plaintiff is entitled to the prayers sought.
6. What should be the orders as to costs?

9. Before discussing the substantive matters herein, the Court shall consider two issues of law raised in Defence.

10. The first is whether this suit is time barred. This Defence is raised by this short one liner in the pleading.

“The entire suit is time barred”.

That defence is not elaborated and Harswell takes the view the pleading offends the provisions of Order VI Rule 4(1) of the Civil Procedure Act as existing at the time of filing of the Suit and Defence. The law was as follows:-

4. (1) A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant statute of limitation or any fact showing illegality –
 - (a) which he alleges makes any claim or defence of the opposite party not maintainable; or
 - (b) which, if not specifically pleaded, might take the opposite party by surprise; or
 - (c) which raises issues of fact not arising out of the preceding pleading.

11. KRA’s position is that the suit is time barred under the provisions of the Public Authorities Limitation (Cap.39), and the Customs and Excise Act(Cap. 472).It contends that even in the absence of specifying the statute and exact provisions, the defence of limitation was sufficiently pleaded.

12. Let me start by considering the sufficiency or otherwise of the plea of limitation by time taken up by the KRA. On this I would think that the observations made by Hon. Gikonyo J in Mohamed Abdikadir Mohammed v Sammy Kagiri & another [2016] eKLR in respect to Order 2 Rule 4(1) which are the current provisions of Order VI Rule 4(1) are valid. The Judge stated:-

“The party relying on limitation should specifically plead it. He may or may not do so for any or no reasons at all. Thus, the plaintiff is entitled to wait to hear from the defendant whether limitation is taken up as a defence. If the defence is taken, it is up to the plaintiff to bring his case within any of the exceptions to the Limitation of Actions Act or other statute of limitation as may be the case. There are good reasons for the position of the law that the defence of limitation should be pleaded specifically. First, it is intended to avoid ambush upon or taking the plaintiff by surprise on such a fundamental issue as limitation of actions. Second, the Plaintiff is notified of the defence of limitation; in effect he is told that his claim is not maintainable in law. And, third, the plaintiff gets the opportunity to plead such facts as are necessary to bring his claim within the exception of Section 27 of the Limitation of Actions Act. Ordinarily, he will do so in his reply to defence. Accordingly, a party who wishes to invoke or rely on a defence of limitation must specifically plead it in his defence or any other subsequent pleading, if he is to rely on limitation as a basis of defeating the plaintiff’s claim”.

13. The issue here is whether the law requires that pleadings subsequent to a plaint specifically plead the nature of defence of limitation or

do so by also pointing out the statute relied on. It seems to this Court that what must be pleaded specifically is any matter which the pleader alleges makes any claim or a defence not maintainable and which, if not specifically pleaded, might take the opposite party by surprise or which raises issues of fact not arising out of the preceding pleading. The Rule itself gives examples of what must be specifically pleaded. Examples given in the Civil Procedure Rules serve a useful purpose as they are a pointer of how the Rules Committee (that makes the Rules) envisioned that a rule would apply in practice. In regard to illustrations in statute Lord Shaw, in **Mohamed Syedol Ariffin and Yeoh Ooi Gark** [1916] 2A.C 575 (cited to me by KRA) at page 8 remarked;

“The great usefulness of the illustrations, which have, although not part of the sections, been expressly furnished by the Legislature as helpful in the working and application of the statute, should not be thus impaired”.

14. While examples or illustrations should not be overlooked in construing a statute, they cannot be taken to be prescribing exhaustive or closed lists. That would be to improperly stretch their purpose because if the law maker intended an exhaustive list then it would be expressly stated to be as such and not merely an illustration. For sure the examples given under Rule 4(1) are just that, they are examples and not intended to be an exhaustive or closed list. While in respect to the defence of limitation the example given suggests that the relevant statute of limitation needs to be specifically pleaded, I would think that a party who simply pleads that an action is time barred gives sufficient notice to the opposite side that it is alleging that the claim is not maintainable on account of it being time barred. That said, it is good practice for a party taking up the plea of time barred to specify the statute relied on and even better still the specific statutory provision.

15. If, however, the plea taken is as general as that taken by KRA in this matter, then it is open to opposite party to seek for further and better particulars. That is the purpose of Order 2 Rule 1(2) of the CPR (Previously Order VI. Rule 8(2)). By not invoking this available device then it must be taken that Harswell was aware of the nature and impact of the plea.

16. KRA attempts to peg the issue of limitation on the provisions of the Customs and Excise Act, and the Public Authorities Limitation Act. While the latter is clearly a statute which provides for limitation of proceedings against the Government, Section 203 (2) (c) and 214 of The Customs and Excise Act cited by KRA do not prescribe limitation on the basis of time. Section 203 (2) (c) provides:-

203 (2) (c) condemnation shall, subject to any appeal in proceedings which resulted in condemnation, be final and, save as provided in section 204 no application or proceedings for restoration or in detinue by any person shall lie.

Which section 214 reads:-

214.(1) The Commissioner may, where he is satisfied that a person has committed an offence under this Act in respect of which a penalty of a fine is provided, or in respect of which anything is liable to forfeiture, compound the offence and may order that person to pay such sum of money, not exceeding the amount of the fine to which he would have been liable if he had been prosecuted and convicted for the offence, as he may think fit; and he may order anything liable to forfeiture in connection therewith to be condemned: Provided that the Commissioner shall not exercise his powers under this section unless the person in writing admits that he has committed the offence and requests the Commissioner to deal with the offence under this section.

(2) Where the Commissioner makes an order under this section –

(a) the order shall be put into writing and shall have attached to it the request of the person to the Commissioner to deal with the matter; and

(b) the order shall specify the offence which the person committed and the penalty imposed by the Commissioner; and

(c) a copy of the order shall be given to the person if he so requests; and

(d) the person shall not be liable to further prosecution in respect of the offence save with the express consent in writing thereto of the Attorney-General; and, unless that consent has been given, if a prosecution is brought it shall be a good defence for that person to prove that the offence with which he is charged has been compounded under this section; and

(e) subject to paragraph (d), the order shall be final and shall not be subject to appeal and may be enforced in the same manner as a decree or order of the High Court.

17. It has to be remembered that the plea in the defence is that the claim by Harswell is time-barred. Section 203 (2) (c) and 214 of The Customs and Excise Act which are not on time cannot be properly taken up.

18. On another front, Harswell took the view that KRA had waived the defence by failing to take it up by way of an interlocutory application and by allowing the hearing to go on. This argument is clearly misconceived because having pleaded it in the Defence, KRA could elect to urge it either at an interlocutory session or after the main hearing. I know of no law that prescribes that a plea of limitation, once properly pleaded, must be taken up before the main hearing.

19. In respect to whether or not Harswell's action is time-barred, I agree with counsel for the Harswell that the plea of limitation must be taken on the character of the action brought. The Plaintiffs cause of action is hinged on a contract allegedly made in October 2004. Under the provisions of Section 3 of The Public Authorities Limitation Act proceedings founded on contract can only be brought against the Government before the end of three years from the date on which the cause of action occurred. This suit was filed on 22nd September 2005, within the time provided by law and is not time barred. Whether or not the Plaintiff has made out its case on the basis of the law of contract is of course another matter.

20. A limb of KRA's Defence is that the suit is fatally defective and cites Section 203 and 205 of The Customs and Excise Act. This defence, I am afraid, is not available as it was not specifically pleaded as required by Order VI Rule 4 (1) CPR (then, now Order 2 Rule 4(1) CPR). (See the discussion in paragraph 13 of this decision.)

21. The entire thesis of the case by Harswell is that a contract was concluded by way of exchange of four letters of 15th September 2004, 9th October 2004, 25th October 2004 and 26th October 2004. The Defence is that the parties were not at all lines *ad idem* in the epistolary discussion. Before examining the correspondence and its legal effect, the Court starts by briefly setting out the relevant law.

22. Black's Law Dictionary(10th Edition) defines agreement as:-

1. A mutual understanding between two or more persons about their relative rights and duties regarding past or future performances; a manifestation of mutual assent by two or more persons. 2. Parties' actual bargain as found in their language or by implication from other circumstances, including course of dealing, usage of trade, and course of performance.

23. Examples are abound where exchange of letters or other correspondence have given rise to a concluded contract as long as the three basic essentials to creation of a contract are present; agreement, contractual intention and consideration. In Monrovia Motorship Corporation v. Keppel Shipyard (Private) Ltd. (The "Master Stelios") [1983] 1 Lloyd's Rep. 356., a decision cited by counsel for the Plaintiff, the privy council held:-

Their Lordships will consider first the owners' case on the pleadings as to the legal effect of the three telex messages BI to B3. Their Lordships are of opinion that, as a result of these messages, a concluded agreement between the parties came into existence.

24. As it is part of the case by KRA that Harswell made a conditional acceptance and so there was no agreement, the Court observes that a rejection terminates an offer in much the same way as an attempt to accept an offer on new terms (see Chitty on contract 27th Edition at paragraph 2-063).

25. Now the facts. After exchange of various correspondence, the writes to Harswell on 15th September 2004 as follows:-

15th September 2004

Harswell Trading Limited

Manor Farm Cottage

ENGLAND

"without prejudice"

ATT: MR. Martin J. Linnell BA, ACMA

Dear Sir,

RE: HARSWELL TRADING LIMITED – CLAIM AGAINST

KENYA REVENUE AUTHORITY FOR £182,275.00

We refer to the above matter.

.....

Please note that the offer to settle this matter at Kshs.10,471,016.00 is made subject to you signing the accompanying Discharge Instrument.

Yours faithfully,

H. A. Bila

Senior Deputy Commissioner – Legal Services

26. After some hesitation, Harswell write back as follows:-

Commissioner, Support Services,

NAIROBI.

20th September 2004

Dear Mr. Matemu

Our claim against the KRA – Your ref KRA/L8/C&E/526

Thank you for your time when I was in Nairobi. I think the meetings were very useful and hopefully are now near to bringing this protracted matter to a close.

I have received the formal offer letter from Mr. Matuku dated 15th September, which essentially states the figures put together on your side of the table. Before I consider formal acceptance or rejection of this offer, could you please clarify the position regarding the procedure outlined at the end of our meeting, namely that both sides would present to the Commissioner General the two sets of figures that had emerged, with the intention that a final figure be agreed for presentation to the KRA Board.

The reminder of this letter assumes that this procedure is in hand. It needs to be read in conjunction with the document I left at Times Tower before I returned to the UK.

As stated at our initial meeting, I had a “bottom line” figure in mind. As you may have guessed, this was Kshs.15,000,000 plus the cost of my recent trip to Nairobi. On reviewing the figures as they emerged from our meetings, it seems I need to modify that to an extent – though it is easy to put together justifiable figures that exceed that “bottom line”, I recognize that this involves stretching the constraints on areas of discussion requested by Mr. Waweru.

What follows is my firm proposal for a final settlement. This has been put together with the intention of being fair to both parties rather than as a starting point for further negotiation. I hope it will be seen as such and dealt with accordingly.

I trust therefore that my proposal will be acceptable and can form the basis of your final offer letter.

I confirm that the draft Discharge Instrument is satisfactory. We will, of course, need a formal waiver of Customs’ costs awarded in the Court case. A letter from Mr. Matuku or from you will suffice, simply confirming that, in the event of a settlement, these costs will not be pursued.

I look forward to hearing from you shortly.

Yours sincerely

Martin J. Linnell BA ACMA

Cc Mr. M G Waweru, Mr. F M Thurairira

27. To be noted and on which KRA has made heavy weather is that the acceptance was on condition that payment was made within reasonable time and also subject to KRA not insisting on costs in the high court litigation. Harswell holds to the two conditions until the 22nd October 2004.

28. On 25th October 2004, KRA responds as follows:-

25th October 2004

Harswell Trading Limited

Manor Farm Cottage

ENGLAND

“without prejudice”

ATT: MR. Martin J. Linnell BA, ACMA

Dear Sir,

RE: HARSWELL TRADING LIMITED – CLAIM AGAINST

KENYA REVENUE AUTHORITY FOR £182,275.00

Refer to your facsimile letters dated 8th, 11th and 22nd October 2004.

Your acceptance of the offer to settle the matter at Kshs.10,471,016 is subject to certain conditions as outlined in your letter of 22nd October 2004.

I wish to point out that a conditional acceptance is not an acceptance.

Further, please note that the offer of Kshs. 10,471,016 was final.

Yours faithfully,

H. A. Bila

Senior Deputy Commissioner – Legal Services

29. It would seem therefore that the conditional acceptance by Harswell was an attempt by it to accept the offer made by KRA but on new terms. Clearly then there would be no agreement unless KRA accepted the new terms but as KRA rejected the conditional acceptance through its letter of 25th October 2004, there was no agreement as of that date.

30. On 26th October 2004, Harswell writes:-

Kenya Revenue Authority

NAIROBI

For the attention of Ms H. A Bila

Senior Deputy Commissioner – Legal Services

26th October 2004

Dear Sirs

Our claim against the KRA - Your ref. KRA/L8/C&E/526

I have received your fax of yesterday.

You state that "a conditional acceptance is not an acceptance". In other words, the KRA want unconditional acceptance of their offer, along with our trust that they will then deal with it in a suitable and expedient fashion.

As that is what you want, you have our unconditional acceptance. This letter hereby accepts KRA's final offer of Kshs.10,471,016 without any conditions.

This acceptance obviously cannot be without some form of time limit. We therefore reserve the risk to reconsider our acceptance of this offer if payment is not received by 6th December 2004.

This date is consistent with there being a Board meeting on or around 22nd November and expectation that the Board will authorize release of the funds at the meeting. It is also three months after the first of my meetings in Nairobi at which the matter was discussed and a year since discovery of the theft of our goods.

Since there is now no reason why the matter should not be brought to a speedy conclusion, I shall presume that you will do whatever needs to be done and let us know when we should arrange collect the payment.

Since, no doubt, you will need to have the original of this letter also, I would confirm that this will be forwarded by express post today. The signed Discharge Instrument was posted to you yesterday.

I should be grateful if you could please ensure that we are kept informed on progress.

Yours faithfully

Martin J. Linnel BA ACMA

Company Secretary

31. KRA contends that the two issues were still outstanding and so there was still no agreement even as at 26th October 2004. Let us examine this stance beginning with the question of costs.

32. On 28th October 2004, Harswell writes as follows:-

Kenya Revenue Authority,

BY FAX

NAIROBI.

For the attention of Ms H. A Bila

Senior Deputy Commissioner – Legal Services

28th October 2004

Dear Sirs,

Our claim against the KRA – Your ref KRA/L8/C&E/526

You now have our acceptance of the KRA's final offer of Kshs.10,471,016 in settlement of the above claim.

Could you please draft and forward a suitable document concerning waiver of the costs awarded by the High Court in Case 1025 of 2002.

Please note that this is not a condition of our acceptance of the above offer. This entirely unconnected request does not therefore provide any reason for delay in the procedures in hand with relation to the above matter.

Yours faithfully

Martin J. Linnel BA ACMA

Company Secretary

An important aspect of this letter is that the Harswell emphasizes that the issue of costs in the High Court litigation is not a condition for the KRA's final offer that it had already accepted.

33. On 11th November 2004 KRA responds.

11TH November 2004

Harswell Trading Limited

Manor Farm Cottage

ENGLAND

“without prejudice”

ATT: MR. Martin J. Linnell

Dear Sir,

RE: HARSWELL TRADING LIMITED – CLAIM AGAINST

KENYA REVENUE AUTHORITY FOR£182,275.00

Refer to the facsimile letters dated 26th October 2004, 28th October 2004 and 5th November 2004.

We acknowledge receipt of your unconditional acceptance of our offer as per letter dated 26th October 2004 and the documents for the necessary approvals for the payments are under way. As regards the waiver of the costs awarded Kenya Revenue Authority by the High Court in Case No. 1025 of 2002 we are looking into the matter. However, this should not be an impediment to the processing and subsequent payment of the agreed amount.

We also request that you favour us with the hard copy of your unconditional acceptance and the undertaking both by yourself and the one you wish the Authority to execute.

Yours faithfully,

H. A. Bila

Senior Deputy Commissioner – Legal Services

34. From the contents of the above communication KRA understood that Harswell had made an unconditional acceptance of their offer and both sides were treating the issue of costs as separate and distinct and this is not changed by KRA's letter of 22nd November 2004 informing Harswell that it only intended to recover disbursements in court filing fees. On the facts the Court holds that all discussions in respect to costs that came after 26th October 2004 were outside the agreement reached by the parties and did not undo the acceptance given by Harswell on that date. Both sides understood this to be the position and expressed themselves as much.

35. What then is to be made by Harswell's position of 26th October 2004, in which having stated that it was making an unconditional acceptance, nevertheless stated;

“This acceptance obviously cannot be without some form of time limit. We therefore reserve the right to reconsider our acceptance of this offer if payment is not received by 6th December 2004”.

36. It would seem, and this Court accepts KRA's argument, that although Harswell avowed that it was making an unconditional acceptance, it was introducing a new condition. It was imposing a deadline for payment to be made. If this new term was not accepted by KRA then there would no agreement. I however think that the letters by KRA that followed demonstrates that this new condition was accepted by it. See for example the letter of 11th November 2004 reproduced in paragraph 33 of this decision.

37. Again on 20th December 2004 KRA writes:-

20th December 2004

Harswell Trading Limited

Manor Farm Cottage

ENGLAND

Harswell Trading Limited

Manor Farm Cottage

ENGLAND

“without prejudice”

ATT: MR. Martin J. Linnell

Dear Sir,

RE: HARSWELL TRADING LIMITED – CLAIM AGAINST

KENYA REVENUE AUTHORITY FOR £182,275.00

We refer to your facsimile dated 15th December 2004 whose contents we have noted. We will inform you once the cheque is ready.

Yours faithfully,

H. A. Bila

Senior Deputy Commissioner – Legal Services

38. In these two letters KRA accepts the manner in which Harswell had by its letter of 26th October 2004 assented to its offer and then in fact assures Harswell that “we will inform you once the cheque is ready”. From an objective point of view it seems clear that KRA intended to be held to its promise to pay Kshs.10,471,016, an offer that had been accepted by the Harswell. I have to find that two essentials of a contract were present; an agreement and a contractual intention.

39. Before turning to whether there was consideration, this would be an appropriate point to detour to an issue raised by KRA. It holds that this suit does not lie against it because the Commissioner for Customs and Excise is neither the Commissioner General of KRA nor KRA itself. In this regard the Court is referred to Section 206 of the Customs and Excise Act which reads:-

206.(1) Where under this Act proceedings may be brought by or against the Commissioner, then the Commissioner may sue or be sued in the name of the Commissioner of Customs and Excise and may for all purposes be described by that name; and, notwithstanding that an action may lie in tort, the Commissioner shall be responsible for the acts and defaults of an officer as if the officer were his servant or agent: Provided that nothing herein contained shall confer a right of action against the Commissioner in his representative capacity, whether in contract or in tort, unless such right of action is specifically given in any other provision in this Act.

(2) Where under this Act proceedings are brought by or against the Commissioner in his representative capacity, costs may be awarded to or against the Commissioner.

(3) Where under this Act proceedings are brought by or against the Commissioner in his representative capacity and -

(a) any sums or costs are recovered by the Commissioner, then those sums or costs shall be credited to the customs and excise revenue:

(b) any damages or costs are ordered to be paid by the Commissioner, then those damages or costs shall be paid out of the monies appropriated for the administration of the customs and the Commissioner shall not be personally liable therefor.

And Section 3(2) of The Kenya Revenue Authority Act (No.2 of 1995):

(2) The Authority shall be a body corporate with perpetual succession and a common seal and shall, subject to this Act, be capable in its corporate name of—

(a) suing and being sued: Provided that any legal proceedings against the Authority arising from the performance of the functions or the exercise of any of the powers of the Authority under section 5 shall be deemed to be legal proceedings against the Government within the meaning of the Government Proceedings Act (Cap. 40);

(b) taking, purchasing or otherwise acquiring, holding, charging or disposing of movable and immovable property;

(c) borrowing or lending money;

(d) doing or performing all other things or acts for the furtherance of the provisions of this Act, which may be lawfully done or performed by a body corporate.

40. I take a view that this argument ignores or overlooks provisions of Section 23 of the KRA Act which reads:-

Sec. 23: Construction and modification of other written laws On and after the coming into force of this Act—

(a) all references to the Commissioner of Customs and Excise, Commissioner of Income Tax or the Commissioner of Value Added Tax in any written laws shall be construed as references to the Commissioner-General of the Authority;

(b) deleted by No. 4 of 2004, s. 70;

(c) any reference to Customs and Excise Department, Income Tax Department or Value Added Tax Department in any written law shall be deemed to be reference to the Authority;

(d) except as provided in paragraph (a) any reference to an officer of the Customs and Excise Department, Income Tax Department or Value Added Tax Department howsoever designated in any written law shall be deemed to be reference to such officer of the Authority.

The KRA Act commenced on 1st July 1995, a date later than the Custom and Excise Act which commenced on 13th October 1978 and Section 23 therefore applies.

41. Even I have misapprehended the law as to the relationship between KRA and the Commissioner of Customs and Excise still, and this is crucial, the agreement discussed in the preceding paragraphs of this decision was reached between Harswell and KRA. KRA presumably entered this agreement on behalf of the Commissioner of Customs and Excise. KRA cannot resile on this position.

42. So was there consideration? It is accepted that actual forbearance can constitute a valid consideration. Harswell's case is that in accepting the offer it undertook not to commence or/institute legal proceedings of whatever nature against KRA in respect to compensation for the loss of goods in containers No. AWSU 490055-6 and INKU 228084-6. To be fair to Harswell that, in fact, is the entire tenor of the discharge it signed. For good measure let me reproduce it:-

UNDERTAKING BY MARTIN J. LINNELL FOR HARSWELL

TRADING LIMITED

In consideration of the Kenya Revenue Authority compensating me for the loss of goods belonging to M/s Harswell

Trading Limited contained in Container Nos. AWSU 490055-6 and INKU 228084-6, I do hereby undertake.

(1) To accept the sum of Kshs.10,471,016.00 in full and final settlement of all claims by Harswell Trading Limited against the Kenya Revenue Authority and/or the Commissioner of Customs and Excise.

(2) Not to commence and/or institute by myself or Harswell Trading Limited any Legal proceedings of whatever nature against the Kenya Revenue Authority and/or its servants, agents, officials and/or assigns in any capacity whether official, personal, private or corporate or however described and in whatsoever manner at any time in the present or future.

(3) Not to disclose the contents, terms and/or conditions contained and/or set out in this undertaking to any organization, agent, assign and/or any person however described and in whatever circumstances at any time in the present or future.

(4) Upon execution, this instrument shall constitute a discharge voucher in respect of all claims made and/or intended by myself or Harswell Trading Limited against Kenya Revenue Authority, the Commissioner of Customs and Excise, the Commissioner General Kenya Revenue Authority, and against any person or body standing in a vicarious relationship to Kenya Revenue Authority, the Commissioner of Customs and Excise, and/or Commissioner General or the Kenya Revenue Authority whether jointly or severally.

I further state that this undertaking has not been executed under any duress and/or influence and that the same was executed voluntarily and it duly commits myself and M/S Harswell Trading Limited.

Dated at Nairobi this day 9th of October 2004.

Signed

43. KRA argues that there was no consideration or valid consideration as no action could lie against the Commissioner of Customs and Excise or KRA. That both the Plaintiff and Defendant were labouring under a common mistake of law that Harswell had a right to commence the proceedings it had threatened. This Court however need not consider this line of defence because common mistake was not specifically pleaded as required by the provisions of order VI rule 4(1)(now order 2 rule 4(1)) which I have set out elsewhere in this judgment.

44. This Court finds that there was valid consideration.

45. Next, the Court deals with the defences of misrepresentation and undue influence. Both were pleaded and particularized in paragraph 8 of the Defence. That aside they require specific proof. On this KRA fell short because it choose not to call any evidence. And on the evidence of the witnesses of Harswell, the two defences are unproved.

46. The conclusion I draw is that Harswell has made out a case as to the existence of a contract and as it is common cause that KRA did not pay as promised, breach as well has been proved.

47. In addition to Kshs.10,471,061.00 which was expressly promised by KRA, Harswell makes a claim of Kshs.3,622,500.00 being loss of business at the rate of Kshs.345,000 from 1st November 2004 until September 2005, the month this suit was filed. Is this latter claim justified?

48. It has to be recalled that the contract was for payment of a specific sum of Kshs.10,471,061. A term of the contract was also that Harswell reserved its right to reconsider the acceptance of the offer if payment was not received by 6th December 2004. It is common ground that payment was not received by 6th December 2004 and has in fact not been made to date. It is nonetheless also evident that Harswell did not bargain for compensation for further loss of business in the event payment did not come by 6th December 2004. In the circumstances this Court cannot find a basis for grant of loss of business beyond that agreed by the parties and Harswell will have to be content with payment of interest as compensation for delayed payment. The claim for Kshs.3,622,500 is declined.

49. The upshot is judgment is entered for the Plaintiff against the Defendant for the sum of Kshs.10,671,016.00 with interest thereon at Court rates from the date of filing suit until payment in full. The Plaintiff shall also have costs.

Dated, Signed and Delivered in Court at Nairobi this 18th Day of October 2019

F. TUIYOTT

JUDGE

PRESENT:

Lele for Ohaga for Plaintiff

Nyakundi for Ojiambo SC for Defendant

Court Assistant: Nixon