REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 162 OF 2014

PANKAJ TRANSPORT PVT LIMITED ……PLAINTIFF

VERSUS

SDV TRANSAMI KENYA LIMITED……DEFENDANT

JUDGMENT OF THE COURT

Pleadings

1. This suit was commenced vide the plaint dated **24th April, 2014** and filed herein on **28th April, 2014**. The plaintiff's case is that by a memorandum of understanding entered into between the plaintiff and Rika Global India limited *(hereinafter referred to as "Rika") on* 29th August, 2011, Rika engaged the services of the plaintiff for the purposes of facilitating the transportation of 32.2 tonnes of sugar *(hereinafter the "goods")* from the port of Mombasa, Kenya, to Jinja in Uganda.

2. The goods the subject matter of the agreement dated 29th August, 2011 between the plaintiff and Rika, related to the following agreements entered into by Rika, with the following parties, for the purchase and delivery of sugar from Mumbai, India to Jinja in the republic of Uganda:

- Agreement dated 27th August, 2011 with Kakira Sugar Uganda for purchase and delivery of 5000MT of sugar;
- Agreement dated 29th August, 2011 with World Point Uganda for purchase and delivery of 2000MT of sugar;
- Agreement dated 10th September, 2011 with Felistar Uganda, for purchase and delivery of 2000MT of sugar;
- Agreement dated 27th September, 2011 with VGR World Uganda for purchase and delivery of 1800MT of sugar; and
- Agreement dated 20th October, 2011 with Kakira Sugar Uganda for purchase and delivery of 5200MT ones of sugar.

The above parties are referred to herein as "purchasers"

3. By reason of the agreement dated 29th August, 2011, the plaintiff on 7th September, 2011 entered into an agreement with the defendant for the transportation of the goods from Mombasa, Kenya to Jinja, Uganda by road *("The Transportation Agreement").*

4. The Plaintiff's case is that it was a term of the Transportation Agreement that the defendant would deliver the goods to the purchasers within 12 days of receiving the goods in Mombasa, Kenya. The defendant between 19th October, 2011 and 12th January, 2012 received the said goods for the said purpose and on the terms aforesaid.

5. The plaintiff claims that in the premises, the defendant was under a duty as bailee and/or carrier for reward of the goods, to take reasonable care of the goods and to deliver them safely to the purchasers within twelve (12) days of receipt of the goods, in accordance with the Transportation Agreement.

6. The plaintiff alleges that in breach of the Transportation Agreement, the defendant failed, neglected or otherwise omitted to deliver the goods to the purchasers in Jinja within 12 days of receipt. The plaintiff particularized the breach as failure to deliver the goods to Jinja within 12 days of receipt of the goods; changing the mode of transportation of the goods from road to rail; failure to deliver the goods to the purchasers in Jinja by road; failure to prevent pilferage and/or damage of the goods in transit to Jinja

7. By reason of the foregoing, Rika withheld the payment due to the plaintiff for facilitating the transport of the goods from Mombasa, Kenya to Jinja, Uganda. This has caused the plaintiff to suffer loss and damage whose particulars are:

- Loss of future business with Rika Global India Limited worth USD 1,102, 425.
- Withheld payment from Rika amounting to;
    - USD 1,933,200
    - INR 1,317, 520
- Travel expenses amounting to;

    - USD 1,819
    - INR 202, 963

8. The plaintiff alleges that consequent to above, Rika has received claims from the said purchasers for alleged losses they incurred due to the defendant's late delivery, non-delivery and/or delivery of the goods in unmerchantable quality. The alleged claims are as follows:

	USD
a. VGR World Uganda	3,780,414.61
b. Felister Uganda	1,485,231.00
c. World Point Uganda	3,978,798.00
d. Kakira Sugar Uganda	802,453.00
Total	**10,046,896.00**

9. Rika has issued a notice to the plaintiff that the plaintiff would bear sole responsibility for the claims received from the purchasers. The defendant has refused to compensate the plaintiff for the above loses, causing the filing of this suit in which the plaintiff now claims:

- USD 1,933,200.00 and INR 1,317,520.00 in losses suffered by plaintiff
- USD 1,102,425.00 in lost business.
- A declaration that the defendant breached the Transportation Agreement dated 7th September, 2011 and is liable to settle any and/or all claims brought by the purchasers or any of them or by Rika, against the plaintiff, with respect to the transportation of the goods by the defendant.
- USD 1,819.00 and INR 202,963.00 in travel expenses.

- Costs.
- interest.

10. The defendant controverted the plaintiff's suit vide a defence dated **11th June, 2014** and filed herein on **12th June, 2014.** The defendant's defence is that it is a stranger to the plaintiff's claims and more particularly to the Memorandum of understanding entered between the plaintiff and Rika Global India Limited **("RIKA")** and is also a stranger to the various agreements set out in paragraph 4 of the plaint between the plaintiff and several parties referred to therein as "purchasers". The defendant avers that the terms of the said memorandum of understanding and/or the said agreement with purchasers were never disclosed to the defendant and neither was it bound by them or the considerations giving rise to the said agreements in any event.

11. The defendant admits having provided a Quotation for transport services to the plaintiff dated 7th September, 2011 and which Quotation was accepted by the plaintiff on the same day, but that the said quotation was not formalized into an agreement but the parties proceeded on the engagement in the terms set out in the Quotation and also on the defendant's Standard Trading Terms and Conditions *("Standard Trading Conditions")*. Whereas the Quotation agreed on by the parties provided for delivery of the goods within twelve (12) days by road transport from Mombasa, Kenya to Jinja, Uganda, the defendant avers that the said transportation was subject to the Standard Trading Conditions which could vary the said terms in the said quotation and that the defendant reserved to itself absolute discretion as to the means, route and procedure to be followed in the handling, storage and transportation of the goods.

12. The defendant further avers that it was expressly agreed between the parties that the expected volume would be 400 TEUs *(Twenty Foot Equivalent Units)* to be shipped in lots of 50 TEUs or less per single bill of lading. To avoid congestion, the parties agreed that the shipments would not be received at the port of Mombasa all at once, but in reasonable volumes not exceeding 200 TEUs at a time. In breach of the said agreement, the defendant avers that the plaintiff caused the shipments to be received all at once and further increased the volume from 400 TEUs to 620 TEUs compounding clearance logistics and creating delays.

13. The defendant further avers that in the period between 19th October, 2011 and 12th January, 2012 when the subject goods were received at the port of Mombasa by the defendant, a combination of factors beyond the defendant's control occurred making it impossible to deliver the goods by road within the 12 days indicated. The defendant provided the particulars of those factors as follows;

a. For ten(10) days running up to 18th October, 2011 and thereafter, torrential rains pounded the coast region causing flooding and adversely affecting port operations at Mombasa;

b. Bulk produce deliveries including sugar, wheat, maize and rice were most affected;

c. The heavy rains also caused flooding and washing away of sections of the road (Shimanzi and Jomvu roads) and causing traffic congestion between Miritini and Changamwe;

d. The above rains caused serious truck delays with cargo off-take from the port being slowed to a dismal pace of 1000 TEUs as compared to 3000 TEUs in normal times;

e. Ships arriving at the port were delayed for between 10-12 days before proceeding to berth taking another 4-5 days;

f. Power outages affected documentation and equipment at the port; and,

g. Failure of the KRA online clearing system (Simba systems)

14. As a consequence of the foregoing, the defendant avers that the Kenya Ports Authority (KPA) and industry players issued press releases confirming the crisis and urging transporters to use alternative rail

transport to mitigate the crisis.

15. Further, the defendant contends that notwithstanding the port difficulties shown above, the plaintiff compounded the problem by not providing the defendant with and/or delaying consent to the defendant's suggestions of alternate solutions or a speedy method of transportation that was initially available to transport the goods inland but which suggestion was rejected due to higher costs.

16. The defendant avers that in consideration of the factors and difficulties indicated above and by virtue of clause 5 of the Standard Trading Conditions indicated, the defendant transported some of the goods by rail and others by road and the resultant late delivery was beyond its control and the same was otherwise justifiable in the circumstances.

17. The defendant contends that the scope of services agreed upon with the plaintiff was to clear the consignments as Full Container Loads (FCL) and on said to contain (STC) basis. As such, the defendant was never required to pack, weigh and/or confirm the inherent condition of the goods. The received consignments were delivered with seals intact as received ex-vessel and the defendant was not in any position to ascertain the contents. By virtue of the foregoing, the claim for non-delivery and/or delivery of goods in unmerchandisable quality does not arise in deliveries under FCL and STC basis.

18. The defendant contends that it is aware of one (1) container which was stolen in transit but the third party (consignee) was duly paid by their insurers as appearing in documents produced by the plaintiff and no claim arises from this. The defendant denies owing the plaintiff the alleged withheld payments from Rika of USD 1,933,200 and INR 1,317,520.00, the alleged lost business from Rika valued at USD 1,102,425.00, the alleged travel expenses of USD 1,819.00 and INR 202,963.00 and/or the declarations prayed for in the plaint. The plaintiff further denies that any interest is payable as prayed for or at all and puts the plaintiff to strict proof thereof.

19. The defendant contends that as a consequence of the port congestion set out in the defence, it incurred additional and extra costs and expenses on behalf of the plaintiff including demurrage, custom warehouse rent, and re-marshalling charges. The plaintiff further withheld payment of a portion of the transport contract price. The defendant indicated that it would counterclaim for these charges and expenses, but there was no counter-claim filed.

Case Conferencing

20. Parties complied with pre-trial directions and filed separate issues for determination and Witness Statements together with bundles of documents. The suit was heard between **2nd November, 2015** and **23rd May, 2016.**

The hearing

21. The parties called two (2) witnesses each. The plaintiff's first witness **PW1-** was **Vishal Mehta** who adopted his Witness Statement dated **3rd April, 2014** and testified in support of the plaintiff's claim in the plaint. The witness testified that he is the Chief Executive Officer of the plaintiff. He testified that the plaintiff is in the business of *inter alia*, local and international transportation, freight forwarding and logistics services spanning a network of over 40 countries. It has built a reputation of providing the highest standard of transportation services to its clients. On 29th August, 2011, the plaintiff was subcontracted by RIKA to transport 16000MT of sugar (goods) from the port of Mombasa, Kenya to Jinja in Uganda. Rika entered into agreement for the purchase and delivery of sugar from Mumbai, India to Jinja in the Republic of Uganda with the following companies:

- Kakira Sugar Uganda for purchase and delivery of 5000MT of sugar;
- World Point Uganda for purchase and delivery of 2000MT of sugar;
- Felistar Uganda, for purchase and delivery of 2000MT of sugar;
- VGR World Uganda for purchase and delivery of 1800MT of sugar; and

- Kakira sugar Uganda for purchase and delivery of 5200MT of sugar

22. In order to fulfil their obligations under the agreement dated 29th August, 2011, the plaintiff entered into an agreement with the defendant that specializes in cross-border freight services in Kenya to transport the goods from Mombasa, Kenya to Jinja, Uganda. The witness testified that during the preliminary discussions, the plaintiff made it clear to the defendant that the timelines for the delivery of the goods was a vital condition of the contract. This was due to the fluctuating prices of sugar and the waiver of duty by the Ugandan government on sugar imports at the time that would last till 28th February, 2012. The quality of the goods upon delivery was also a vital condition of the contract. In order to ensure the quality of the goods is not compromised during transit, the plaintiff insisted on transportation of the goods by road.

23. The defendant assured the plaintiff that they would deliver the goods to the purchasers by road within 12 days of receiving the goods in Mombasa. This was the only reason the plaintiff agreed to enter into the agreement with the defendant.

24. On 7th September, 2011, the defendant sent the plaintiff a quotation for the transportation of the goods from Mombasa, Kenya to Jinja, Uganda by road that was valid for three (3) months laying out the terms that had been discussed and agreed by the parties. The plaintiff agreed to the quotation and signed it on the same day. It was a term of the Transportation Agreement that the defendant would deliver the goods to the purchasers within 12 days of receiving the goods in Mombasa, Kenya. PW1 testified that on various occasions between 19th October, 2011 and 12th January, 2012, the defendant received the said goods for the purpose and on the terms aforesaid. The plaintiff ensured all the requisite documents in respect of the shipping including the Bills of Lading and invoices were received by the defendant beforehand. PW1 testified that in November, 2011, the plaintiff began noticing delays by the defendant in delivering the goods. By the letter dated 30th November, 2011 from Mr. Charles Maina, the defendant's Commercial Manager the defendant assured the plaintiff that though it was facing challenges, it would deliver the goods as planned. By 21st December, 2011, the plaintiff was still experiencing delays and they wrote to the defendant's Commercial Manager Mr. Charles Maina communicating the plaintiff's frustration at the delay of delivering the goods in accordance with the Transportation Agreement. Mr. Maina responded by his letter of the same day assuring that they were doing everything possible to have the goods delivered. PW1 testified that the defendant was already in breach of the Transportation Agreement at this time as it had taken more than 12 days to deliver the goods. This delay had already caused Rika to communicate their displeasure with the way the transaction was handled.

25. On 26th December, 2011, the plaintiff asked for an update from the defendant and the exact movement plan for the goods. This was followed by another letter on 27th December, 2011. These queries were not answered. However, the defendant had unilaterally decided to have the goods transported by rail as opposed to by road. This was done despite the fact that the plaintiff had insisted the goods were to be transported by road as was provided for in the transportation agreement. PW1 testified that on 27th December, 2011, he was shocked to receive a letter from **Mr. Jerome Binois**, Managing Director of the defendant saying they were unable to transport the goods because the validity of the Transportation Agreement was to be for three (3) months. However, the witness testified that there was no such provision in the Transportation Agreement. The parties had signed the Transportation Agreement prior to the quotation's expiration date.

26. PW1 testified that the delay is delivering the goods by the defendant caused the purchasers lost business opportunity of selling sugar at the peak price. When the goods were delivered, the market price for sugar had crashed and the purchasers had no choice but to sell the goods at a loss. Secondly, the goods were delivered after the deadline for the duty waiver by the Ugandan Government. Due to the defendant's delay in delivering goods, the purchasers were forced to pay duty on the goods; and thirdly, the sugar was kept in the containers for a substantial period of time as result of the defendant's delay which led to the deterioration of the quality of the goods. This also led to Rika being blamed for supplying sub-standard goods.

27. As a result of the delay by the defendant, Rika by its letter dated 20th March, 2012 withheld the payments due to the plaintiff for the transportation services (a cop is at page 20 of the plaintiff's documents). The withheld payments amounted to USD 1,933,200 and INR 1,317,520 *(copies of the unpaid invoices are at pages 30 to 113 of the plaintiff's documents).* By the same letter, Rika issued a notice to the plaintiff informing it that it would be held responsible for all the losses that would arise as a result of the delay in delivery of the goods from Mombasa, Kenya to Jinja, Uganda.

28. PW1 testified that each of the purchasers raised a claim against Rika. The claims by the purchasers are as follows:

- Kakari Sugar Limited raised acclaim through AZB and partners by the letter dated 18th August, 2012 claiming USD 802,453 as loss and damages.
- VGR World Limited raised a claim through Kalenge Bwanika Ssawa & Company advocates by the letter dated 17th July, 2012 seeking USD 3,780,414.61 as loss and damages.
- Felistar Uganda Limited raised a claim through Kalenge Bwanika Ssawa & Company advocates by the letter dated 17th July, 2012 seeking USD 1,485,231.65 as loss and damages.
- World Point Group Limited raised a claim through their letter dated 24th July, 2012 claiming USD 3,978,798 as loss and damages.

29. The witness testified that the plaintiff is now being held liable to settle all the aforementioned sums amounting to USD 10,046,896. Further, Rika has refused to release payment to the plaintiff for its transport services as a result of the defendant's delay in delivering the goods in accordance with the Transpiration Agreement.

30. With the aim of settling the matter out of court, the witness travelled to Kenya on multiple occasions to hold meetings with the defendant's offices. The plaintiff incurred travel expenses amounting to USD 1,819 and INR 202,963. This was spent in purchasing the air tickets and paying for accommodation while in Kenya *(a copy of the invoices and receipts are at pages 21 to 29 of the plaintiff's documents).*

31. The defendant's delay in delivering the goods also caused Rika to discontinue its business relationship with the plaintiff. The plaintiff had enjoyed a good working relationship with Rika prior to the agreement for delivery of goods to Uganda.

32. As a result of the defendant's delay, the plaintiff has lost out on transportation business with Rika of 14,699 containers, which at the rate of USD 75 per container, amounts to USD 1,102,425.

33. **PW2** – was **Rajen Gori** who testified in support of the plaintiff and whose testimony mirrowed that of PW1. He adopted his Witness Statement dated **3rd April, 2014**. He further testified that it was a key provision of the agreement that cargo start moving from the port of Mombasa within 7 days and that each consignment would be completed within 12 days.

34. Prior to entering into this agreement, Rika had contracted the plaintiff a number of times to provide international transportation, freight forwarding and logistics services. The plaintiff used to charge Rika an average of USD 75 per container for its services. Rika had developed a good working relationship with the plaintiff.

35. PW2 testified that Rika entered into agreements for the purchase and delivery of sugar from Mumbai, India to Jinja in the republic of Uganda with the companies already mentioned by PW1. In order to fulfill its obligations under the agreement dated 29th August, 2011, the plaintiff entered into an agreement with the defendant as aforesaid.

36. Rika ensured that on various occasions between 19th October, 2011 and 12th January, 2012 the goods were delivered in the port of Mombasa. Rika therefore handed over the responsibility of the goods to the plaintiff to fulfil its obligations under the agreement of 29th August, 2011.

37. PW2 testified that contrary to the terms of the agreement of 29th August, 2011, the plaintiff did not ensure the goods were delivered in Jinja, Uganda within 12 days. The delay in delivering the goods caused the loses which the plaintiff now claims.

38. PW2 further testified that Rika also discontinued all business it had planned to conduct with the plaintiff in future. The various shipments that Rika has conducted since discontinuing its business with the plaintiff are outlined below;

- Transport of 2,062 containers from the Port of Chennai to Port Sudan.
- Transport of 1,187 containers from the Chittagong Port to Port Sudan.
- Transport of 682 containers from Gateway Terminals India to Port Sudan, Port Taichun, Port Surabaya, Port Colombo and Port Karachi.
- Transport of 40 containers from Hazira Port to Dar es Salaam Port.
- Transport of 833 containers from Jaigard Port to Port Sudan.
- Transport of 940 containers from Jawaharlal Nehru Port Trust to Port Colombo, Jakarta Port, Port Karachi and Port Sudan.
- Transport of 632 containers from Kandla Port of Port Sudan.
- Transport of 1284 containers from Port Karachi to Port Colombo, Jeddha Islamic Port and Port Sudan.
- Transport of 479 containers from Kolkata Port to Port Sudan.
- Transport of 2757 containers from Mundra Port to Bangkok Port, Hai Phong Port, Port Jebel Ali, Jeddha Islamic Port, Port of Massawa, Penang Port and Port Sudan.
- Transport of 1575 containers from Nhava Sheva Port of Belavan Port of Djibouti, Jeddha Islamic Port, Port Karachi, Port Kelang and Port Sudan.
- Transport of 362 containers from Nhava Sheva International Container Terminal to Port Sudan Dar es Salaam Port, Port of Halifax, Port Karachi, Port Sudan and Port of Taichung.
- Transport of 1795 containers from Port Qasim to Jeddha Islamic Port and Port Sudan.

39. On their part the defendant's witness **DW1- Prabhulal Jayantilal Shah** testified that between the months of October, 2011 until January, 2012 the country experienced very heavy rainfall and especially in the coastal region. The heavy rains caused numerous and consistent power outages in the region making both communication and port operations to slow considerably as most IT and technical systems are powered by electricity. The above resulted in heavy congestion and backlog of container traffic and other cargo at the port. The problem was so significant that Kenya Ports Authority issued a Press Release on the slow down of Port operations. Additionally, the heavy rains rendered many roads impassable and specifically the Mombasa – Nairobi highway around Jomvu and Mariakani area. This caused major delays in road transportation which added to already congested port situation and leading to a crisis for most Clearing and Forwarding Agents. Consequently, many road transport companies increased their charges for road transport and the rerouting of cargo to rail equally caused congestion on the rail transport.

40. DW1 testified that as an industry player, he monitored the situation closely and he is aware that members of KIFWA made many adjustments on the handling of client cargo under those circumstances. Having been in the industry for many years, DW1 said he was conversant with the manner in which clearing and forwarding agents conduct their business. It is common practice for clearing and forwarding agents by prior notification to their clients to make alternative arrangements to transport their client's goods to their destinations in order to try and meet the deadlines as well as deliver in the most cost effective way. The witness testified that in accordance with their Standard Trading Conditions it would be perfectly in order for a clearing and forwarding agent to make this kind of decision in extraordinarily circumstances or in situations of *"force majeure"*.

41. **DW2, Charles Maina** testified that he is employed by the Defendant as the Commercial Manager Sea Import Transit and based at the Mombasa office. He testified that the defendant is a Limited Liability Company incorporated in Kenya to carry on multimodal logistics solutions in Eastern and Central Africa which business includes clearing and forwarding, local and cross border freight as well as all modes of transportation.

42. The witness testified that the nature of his work involves managing the day to day running and overseeing transit commercial activities in Mombasa to ensure that merchandise received is cleared and transported to the customer destination.

43. On or about 7th September, 2011, the defendant provided a Quotation for transport services to the plaintiff dated 7th September, 2011 which quotation was signed and accepted by the plaintiff on the same day. There was no further agreement signed between the defendant and the plaintiff and the Quotation signed on 7th September, 2011 formed the basis of the contract between the plaintiff and the defendant. At all material times therefore the transportation was carried out in the terms of the Quotation and the Defendant's Standard Trading Terms and Conditions *(Standard Trading Conditions).*

44. Under the Quotation, the defendant's obligations were limited to receiving the plaintiff's cargo in the form of sugar containers ex vessel at the port of Mombasa; transit port clearance ex Mombasa port; loading and lashing of the cargo in Mombasa port; transportation ex vessel Mombasa port of FOT Jinja not cleared and not discharged; boarder clearance Kenya; and return of the empty containers on the same truck back to the shipping line depot in Mombasa.

45. Part of the conditions of the contract included that all shipments would not be received at the port of Mombasa at once but in reasonable volumes not exceeding 200 TEUs at a time. The Quotation also provided that the defendant would transport the goods within 12 days from ex vessel by road and would follow the Mombasa, Eldoret Malaba and Jinja route.

46. DW2 testified that the defendant also supplied to the plaintiff a copy of the Defendant's Standard Trading Terms and Conditions by which every transaction involving the defendant is subject to. The Standard Trading Conditions paragraph 1 expressly provides that every term and condition stipulated therein is deemed to be incorporated in every agreement between the defendant and the contracting party.

47. Condition 5 of the Standard Trading Conditions clearly provides that the defendant reserves to itself the absolute discretion as to the means, route and procedure to be followed in the handling, storage and transportation of goods. Further, that if in the opinion of the defendant it is necessary in the best interest of the customer to depart from the Quotation, the defendant is at liberty to do so. With full knowledge of the terms of the Quotation subject to the terms of the Standard Trading Conditions, the plaintiff signed the Quotation. The contract merchandise, that is imported sugar, was received at the port of Mombasa by the defendant for transportation to Jinja, Uganda as per the Quotation and Standard Trading Conditions. On diverse dates between 19th October, 2011 and 12th January, 2012, the plaintiff increased the expected volumes from 400 TEUs to 620 TEUs. The defendant was hopeful that the same could be handled as it had the ability to handle the shipments on the basis of assurances given by the authorities.

48. DW2 testified that at the time when the defendant received the cargo, various factors beyond the defendant's control occurred making it impossible to deliver the goods by road within the 12 days period. The particular factors were as follows:

- For ten (10) days running up to 18th October, 2011 and thereafter, torrential rains pounded the coast region causing flooding and adversely affecting port operations at Mombasa;
- All cargo including bulk product deliveries including sugar, wheat, maize and rice were most affected;
- The heavy rains also caused flooding and washing away of sections of the road (Shimanzi and Jomvu Roads) causing traffic congestion between Miritini and Changamwe;
- The above rains caused serious truck delays with cargo off-take from the port being slowed to a dismal pace of 100 TEUs as compared to 3000 TEUs in normal times;
- Ships arriving at the port were delayed for between 10-12 days before proceeding to berth taking another 4-5 days.
- Power outages affected documentation and equipment at the port; and
- Failure of the KRA online clearing system (Simba system).

49. The witness testified that these factors were in the public domain as the Kenya Ports Authority and industry players issued press releases confirming the crisis at the port and urged transporters to use alternative rail transport to mitigate the crisis. The press releases clearly stated the challenges posed on road transport due to the flooding and heavy rains as well as numerous power outages at the port and highlighted most of the goods highly affected sugar being one of them. The press releases were in the form of newspaper articles on various dates between 18th October, 2011 in the Standard Newspaper and 17th January, 2012 in the Business Daily and the Daily Nation.

50. Confronted with the impossibility of finding road transport in the circumstances to transport the cargo within the agreed price range and timeframe, the defendant notified and requested the plaintiff to accept a higher transport rate to enable the defendant find a suitable and available road transport. The plaintiff however declined to accept the defendant's proposal.

51. In the prevailing circumstances, the defendant invoked condition number 5 of the Standard Trading Conditions and resolved to transport some of the goods by rail and others by road. Subsequently the goods could not be delivered within the 12 days period agreed upon with the plaintiff and the resultant delay was justifiable due to factors purely beyond the defendant's control.

52. In addition, due to the flooding, port congestion and failure on the KRA clearing machine, both rail and road transport were heavily affected and this affected their efficiency. The defendant exercised due diligence to contract the only and most efficient rail transport in the circumstances but due to the high demand and huge backlog, rail transport could not manage to deliver the goods within the agreed period.

53. The witness testified that despite the defendant's efforts to put in all measures reasonably possible to honour their obligations under the contract and even incurring additional costs and expenses on behalf of the plaintiff including demurrage, custom warehouse rent and re-marshalling charges, the plaintiff failed to pay a portion of the contract price despite various demands by the defendant.

54. DW2 testified that in the premises, the defendant was not in any way negligent in carrying out its duties under the contract and the performance of the contract was frustrated by acts beyond the defendant's control. The witness testified that in any event, under the contract and Trading Terms, the defendant cannot be held liable for any losses suffered by the plaintiff including consequential losses, anticipatory losses or loss of market or indirect damage as this is expressly excluded in condition 13(iv) of the Standard Trading Conditions. The witness asserted that the defendant did not breach the terms of the Quotation and or the Standard Trading Conditions and wholly blames the delay occasioned in the circumstances to act beyond the defendant's control. The contract therefore was frustrated and no claims should lie against the defendant.

Submissions and Analysis

55. Parties filed submission which I will consider in the cause of the determination hereof.

Issues for Determination

56. From the pleadings and submissions which I have considered, the following are the issues for determination.

i. Whether there was a transportation Agreement between the plaintiff and the defendant; if so what were the terms.

ii. Whether the said Agreement was frustrated and whether there was a force majure element.

iii. Whether consequential loss suffered by third parties to the suit can be admitted.

57. The plaintiff submitted that its claim, which is liquidated, are not challenged and/or controverted by the defendant in any way. The defendant simply denies liability and if it is established that the defendant

is liable, the plaintiff's claims therefore pass uncontroverted and unopposed and judgment is to be entered accordingly.

58. The plaintiff submitted that the only defence by the defendant is that the contract it entered into with the plaintiff was frustrated by force majeure circumstances. The defendant had in its defence identified factors which contributed to the alleged frustration. The first factor is that there were torrential rains that adversely affected port operations, bulk product deliveries, flooding and washing away sections of the road causing traffic congestion. Serious truck delays with cargo off-take being slowed and ships arriving at the port were delayed between 10 to 12 days before proceeding to berth taking another 4 to 5 days. The plaintiff submitted that the above factors are not supported by the evidence that is on record and which was produced in court. The plaintiff submitted that the torrential rains that are alluded to were actually reported in the dailies and the exhibit at page 6 of the defendant's bundle of documents dated **18th October 2011** confirms this. The newspaper cutting talks of rains having pounded the coastal region in the last 10 days which goes backwards to the 8th October, 2011. The evidence produced in court shows that in fact the first consignment consisting of 60 containers was discharged at the port of Mombasa on the 27th October 2011. That being the case, there is no nexus between the torrential rains and the transportation of the first 60 containers which were discharged on the **27th October 2011** and loaded on the **4th November 2011.** [See plaintiff's exhibit at pages 18[a] to 18[l]. The torrential rains, their effects and whatever else could have happened took place before the containers were discharged. The defence of torrential rains is therefore an afterthought and is therefore not valid. If indeed there were torrential rains which affected the transportation including destruction of roads, there was no way the defendant could load the containers to be transported by road on the 4th January 2011. As clearly admitted by the defendant, it had a discretion to use rail if the road transport was not available. In fact it used rail transport in performance of the contract and that has nothing to do with the torrential rains that were expected at the beginning of October 2011.

59. On the alleged power outage which affected documentation and equipment at the port, the plaintiff submitted that evidence produced in court touching on power outages related to January 2012. [See pages 7-10 of the defendant's documents]. The bulk of the containers were discharged by the 3rd January 2012 and therefore there is no evidence whatsoever that any power outages affected the transportation of these containers. The same goes for the failure of Kenya Revenue Authority online system which is referred to in the articles that were produced in court and which related to the period January 2012.

60. On a term in the agreement that provided that the plaintiff had consented with the defendant that the shipments would not be received at the port of Mombasa all at once but in reasonable lot of volumes not exceeding 200 TEUS at a time, the plaintiff noted that the defendant's defence is that the plaintiff offloaded the containers in very large quantities and therefore it was not able to handle these containers in these volumes within the agreed period of time. The plaintiff submitted that the defence too does not hold water in that at no single time did the plaintiff offload the containers exceeding 200 TEUS. The plaintiff's evidence at pages 18[a] to 18[l] is clear that in fact the containers were discharged as follows:

S/NO	DATE	NO. OF CONTAINERS RECEIVED
1.	27/10/2011	60
2.	16/11/2011	150
3.	21/11/2011	80
4.	29/11/2011	4
5.	5/12/2011	56
6.	12/12/2011	63

61. On the use of rail transport due to bulk of the goods, the plaintiff submitted that the defendant does not explain why road transport was used simultaneously with rail transport if the defendant had the capacity to move the containers by road as it maintains. On or about the 16th November 2011, the goods stopped moving by road and the rail mode of transport was adopted. The mode was used for a couple of days up to the 5th December 2011 when again the defendant reverted to road transport. No explanation is given for this apart from an allegation that there was congestion and alternative mode of transport had to be used.

62. The plaintiff submitted that the defendant does not explain why the rail transport was not used from the first day contemporaneous with road transport so as to perform the contract fully. The defendant had the discretion to use whatever mode of transport it deemed appropriate and this had nothing to do with the plaintiff. The plaintiff submitted that the simple explanation given for the defendant's breach of contract is that the defendant who actually drew the agreements itself and provided for the terms and conditions to govern the transportation of the goods, failed to appreciate the magnitude of what it was entering into. Possibly, the profit margin was what enticed the defendant to get into the contract only to realise that it did not have the capacity to move the goods as agreed. That blame falls on the defendant and it was submitted that the defendant is liable for the breach of the contract.

63. It was submitted that as a result of the breach of contract the plaintiff suffered the losses that are tabulated in paragraph 10 of the plaint and the court was urged to find that the plaintiff had proved its case on a balance of probability and to allow the plaintiff's claim as prayed.

64. The next claim that the plaintiff has made is in respect of the various claims received by the plaintiff from the parties to whom the goods were to be delivered. The plaintiff submitted that this is not a consequential loss to a contract but a loss flowing from the plaintiff's breach of contract with the recipients of the goods which breach was occasioned by the defendant's failure to honour its part of the bargain. The plaintiff submitted that it has produced documentary evidence to show that these claims have been made against it and as per the contracts entered into between the plaintiff and the recipients of the goods, the plaintiff is liable and in turn the defendant is liable to the plaintiff in respect of those claims.

65. On the issue of frustration and the doctrine of *Force majeure*, the plaintiff dismissed the applicability of the doctrine to the proceedings.

66. On their part, the defendant submitted that it is settled that unexpected heavy torrential rain pounded the Country particularly the Coastal region causing a serious disruption to the port operations. This was followed by power outages leading to failure of the KPA and KRA IT systems as evidenced by the various press releases issued by KPA as follows:

a. According to the newspaper Article of 18th October 2011, the Managing Director of the KPA advised as follows:

> *"We wish to bring to the kind attention of our esteemed customers in Kenya and transit region that cargo handling operations at the port of Mombasa have been adversely affected by torrential rains that have continued pounding the coast region in the last ten days.*
>
> ***The more than unexpected rains have disrupted operations especially for products that are brought in bulk like sugar, maize, wheat rice etc****. On the other hand the flow of road traffic of which the port relies up to 95% for the receipt and delivery has and continues to face challenges largely on account of* ***destructions visited on the road structures by the heavy rains****. Similarly there are also* ***numerous and persistent power outages*** *that seem to match the downpour. …* ***Frequent power outages have equally affected documentation and equipment performance with an average down time of 6hours experienced in every 24 hours****."*

c. On 1st February 2012, another press release was issued on reshuffle of KPA Managers to assist in streamlining the operations at the port and ease congestion at the port.

d. On 17th January 2012, a subsequent press report was issued with regard to the effect of the increased congestion at the port and measures put in place to ease the congestion. The KPA Managing Director issued a statement as follows:

> *"We have asked Rift Valley Railway Corporation and Rift Valley Railways to take urgent measures to provide 100 to 200 wagons and avail two or three trains daily to operate during the period for the quick evacuation of cargo. This is expected to clear the backlog of all rail bound cargo…* ***The Railway line is able to move only five percent of cargo instead of the envisaged 30 percent…"***

67. It is the Defendant's submission that while the Country ordinarily experiences short rains in the months of October to December, the magnitude of the rains that fell in the year 2011 which resulted in washing away roads and flooding as well as power outages were unexpected and unforeseeable and were factors beyond the Defendant's control.

68. The Defendant submitted that the magnitude of the rains and the devastation caused through flooding and washing away of the roads was so phenomenal that national authorities including KPA and KRA issued press releases advising port users and other stakeholders to use alternative means and also calling on Kenya railways to provide additional support. This was not the expected rainfall in Kenya.

69. The defendant submitted that these were Acts of God and the consequent effect was to frustrate the performance of the contract by delaying the delivery period.

70. The Plaintiff's own document at page 18(a) indicates that the first shipment arrived in Mombasa on 27th October 2011 after the torrential rains had already started and disruptions experienced. This situation continued past Christmas and into the New Year. The Defendant submits that the rains that occurred in October through to January 2012, which caused failure on the clearing system at the port and washing away of roads were unexpected and unforeseeable and the Defendant could not have avoided their occurrence even with utmost diligence. These were acts of God for which the Defendant cannot be held responsible or liable.

71. It is the Defendant's further submission that failure to deliver the consignment within the stipulated 12 days was further aggravated by the Plaintiff supplying excess quantities of the sugar of 610 TEUs all at once contrary to the maximum expected quantity of 400 TEUs to be received in shipments of 200TEUs as stipulated in the contract. On account of the port congestion indicated above, a backlog at the harbor in offloading meant that huge volumes arrived or were received at the same time contrary to the projected timelines in the contract between the parties. The effect of this unexpected increased quantity made clearance of the cargo very difficult.

72. Under clause 13 of the Defendant's Standard Terms and conditions, the Defendant's liability as a private carrier was limited to losses resulting from the Defendant's willful negligence and not acts beyond its control. Clause 13(I & ii) provides as follows:

> *13 (i) The company shall only be responsible for loss of or damage to goods or for any non-delivery or misdelivery if it is proved that loss, damage, non-delivery or misdelivery occurred whilst good were in the actual custody of the company and under its actual control and that such loss, damage, non-delivery or misdelivery was due to the willful neglect or default of the company or its own servants.*
>
> *(ii) The company shall only be liable for any non-compliance with instructions given to it if it is proved that the same was caused by the willful neglect of the company or its own servants.*

<u>Act of God/Force Majeure</u>

73. The defendant submitted that contrary to the Plaintiff's submission at para. 51 that the Defendant did not plead *force majeure*, the Defendant submitted that it had at paragraph 17 of its defence expressly pleaded *force majeure* as follows:-

> *By way of further defence, the Defendant avers that the heavy rains, flooding, power outages and congestion at the port of Mombasa were factors not attributable to the Defendant, the delay having been caused by circumstances beyond the control of the Defendant. The Defendant shall crave leave to rely on Clause 13 (1) of the Standard Trading Conditions to the effect that the Defendant would only be responsible for loss of or damage to goods or for any non-delivery or misdelivery if it is proved …that such loss, damage non-delivery or misdelivery was due to the willful neglect or default of the Defendant or its own servants. The Defendant shall further urge the court to find that the late delivery was caused by force majeure.*

74. On account of the above pleading and the testimony that the delay was occasioned by factors beyond the Defendant's control, the plaintiff attempted several definitions of '*Acts of God'*:-

a. The Black's Law Dictionary defines "*force majeure* " as;

> ***"An** event or effect that can be neither anticipated nor controlled. The term includes both acts of nature (e.g. floods and hurricanes) and acts of people"*

The Black's Law Dictionary defines "*Acts of God*" as;

> ***" An overwhelming, unpreventable event caused by forces of nature such as an earthquake, flood or tornado… the effect of which could not be prevented or avoided by the exercise of due care of foresight."***

b. **<u>Chitty on Contracts</u> Volume 11 defines an Act of God as:**

> ***"an operation of natural forces (as opposed to an act of man) which it was not reasonably possible to foresee and guard against like lightning, extraordinary weather conditions, some extraordinary natural event or a totally unexpected heart attack.***

The defendant cited The East African Court of Appeal in the case of **Ryde vs Bushell & Another (1967) EA 817** where it was held as follows with regard to the plea of *Act of God*:-

> *"(i) The plea of Act of God is available to relieve a defendant from liability for damages suffered following the performance of part of his obligation and not merely to absolve the person from the performance of an obligation;*
>
> *(ii) Nothing can be said to be an act of God unless it is proved by the person setting up the plea to be due exclusively to natural causes of so extraordinary a nature that it could not reasonably have been foreseen and the results of which occurrence could not have been avoided by any action which should reasonably have been taken by the person who seeks to avoid liability by reason of the occurrence."*

75. The defendant submitted that Courts have upheld unexpected weather conditions as unforeseeable acts which are beyond a party's control. Such was the holding in the case of ***Blyth v. Birmingham Waterworks Co. English Court - 1856 11Exch. 781***, where the Court exonerated the Defendant from liability on account of unexpected frost which blocked the pipes and held as follows:-

> ***"The defendants' engineer stated, that the water might have forced its way through the brickwork round the neck of the main, and that the accident might have been caused by the frost, in as much as the expansion of the water would force up the plug out of the neck, and the stopper being encrusted with ice would not suffer the plug to ascend. One of the severest frosts***

on record set in on the 15th of January, 1855, and continued until after the accident in question. An incrustation of ice and snow had gathered about the stopper, and in the street all round, and also for some inches between the stopper and the plug… However that may be, it appears to me that it would be monstrous to hold the defendants responsible because they did not foresee and prevent an accident, the cause of which was so obscure, that it was not discovered until many months after the accident had happened."

76. In the case of ***Tennent vs E.A Glasgow (L. Westbury L.C) 1233,*** *the Court on appeal upheld the defence that that the damage was occasioned by an unprecedented fall of rain and that the Defendant was not liable. The Court held:-*

"It appears to me to be perfectly clear that this was a contingency against which no human foresight could provide against and which no person was bound to provide. Therefore, I quite concur with my noble and learned friend thinking that the appeal ought to be dismissed… I apprehend that there can be no doubt at all that this was an extraordinary and unprecedented flood, as it is called; nor that it was one which it is impossible for any person merely building a wall to enclose his grounds to provide against nor was it necessary to provide for against."

77. The Defendant submitted that the torrential rains were unprecedented and unexpected and their effects, including flooding and washing away of the road, were beyond the Defendant's control and hence the delay occasioned was a result of act of God.

78. As to whether the Defendant took reasonable measures to mitigate the delay, the defendant submitted that having assessed the situation on the ground and following the advisory by KPA it opted to use rail transport. This was in exercise of its discretion under clause 5 of the Standard Trading Terms and Conditions in which the Defendant had the absolute discretion to determine the means, route and procedure to be followed in the handling, storage and transportation of goods. Most importantly the same clause 5 of the Standard Trading Terms and Conditions provides that if in the opinion of the Defendant it was at any stage necessary or desirable in the customer's interests to depart from those instructions, the Defendant would be at liberty to do so. The Defendant's decision to resort to rail transport was not unilateral but involved a consultative process where the Plaintiff was informed as evidenced in the various emails produced in the Plaintiffs bundle as follows:-

a. In the email dated 29th Nov 2011, the Defendant informed the Plaintiff that some of the cargo to World Point would be transported by rail as opposed to road. In the same email, the Plaintiff does not object to the use of the rail and in the email he states that *'I hope we can achieve our targets as mentioned below'*.

b. On 21st December 2011, the Plaintiff sought yet another update on the progress and the Defendant advised that it was discussing an action plan save that at the time it was facing challenges on storage.

c. In the email dated 27th December 2011, the Defendant notified the Plaintiff of the challenges it was facing at the port and attached the various press releases and specifically pointed out the difficulty they were facing with road transport. The Defendant even proposed that the Plaintiff could collect the clearance documents for the vessels which had not been discharged.

79. The defendant submitted that it is an undisputed fact that they eventually transported all the cargo to Jinja by use of rail and road. The change of mode of transport was warranted and reasonable in the circumstances as would have been expected of a carrier faced with the circumstances discussed.

80. The press release quoting the Managing Director of KPA and the PS, Ministry of Transport confirmed that the rail transport was functioning at 5% of cargo uptake instead of the envisaged 30%. The Defendant submitted that the fact that the rail transport was not as efficient as the Plaintiff expected cannot be blamed on the Defendant and the mitigation was reasonable in the circumstances.

81, As to whether the Defendant is liable for alleged withheld payments by Rika, the defendant submitted the allegation by the plaintiff that Rika withheld the payments due to the Plaintiff in the sum of USD 1,9333,200 and INR 1,317,520 as well as loss of future business, is not proved. The Defendant submitted that it is not privy to the agreement between the Plaintiff and Rika and the Plaintiff's witnesses confirmed that the Defendant was not aware of this prior agreement or even the subsequent agreements between Rika and the third parties in Uganda. The Defendant submits that the Memorandum of Agreement (the **MOU**) dated 8th July 2011 was strictly between the Plaintiff and Rika. The Defendant was neither a party to it nor was it intended to be a beneficiary of the said agreement.

82. It is the Defendant's submission that by virtue of being a stranger to the MOU between the Plaintiff and Rika, the Defendant cannot be held liable for losses arising therein. The essence of the doctrine of privity of contract was enunciated in the case of *Dunlop Pneumonic Tyre v. Selfridge and Co. Ltd [1915] AC 847, 853* and as cited by the Court of Appeal in the case of ***Aineah Liluyani Njirah v Agha Khan Health Services [2013] eKLR*** is that:-

> ***"The essence of the privity rule is that only the people who actually negotiated a contract (who are privy to it) are entitled to enforce its terms. Even if a third party is mentioned in the contract, he cannot enforce any of its terms nor have any burdens from that contract enforced against him."***

83. The Defendant's case is that while the doctrine of privity of contract has evolved over the years and various exceptions created such as giving third parties rights to enforce a contract, it must be established that this was indeed the intention of the parties at the time they executed the contract. This was held by the Court of Appeal in the case of ***Aineah Liluyani Njirah v Agha Khan Health Services (supra)*** as follows:-

> ***"A third party should be able to enforce a term of the contract when the contract expressly states that the third party has a right of enforcement, regardless of whether or not the contract benefits the third party. Third, the third party should have a right to rely on a term of a contract which excludes or limits the liability of the third party, provided that was the intention of the parties When a contract expressly benefits the third party, there is a presumption that the contracting parties intended the third party to have a right of enforcement. However, if the contract only impliedly benefits a third party, there is no such presumption, and the third party has no rights unless the contract expressly gives that third party a right to enforce the contract. This creates certainty for, and protects, contracting parties, in that third parties cannot enforce contracts which only incidentally benefit them unless the contract expressly states that they may do so."***

84. It was submitted that from the reading of the MOU produced at page 1 of the Plaintiff's bundle, the only parties entitled to benefit from the contract were the Plaintiff and Rika. The Defendant was neither expressly nor by implication made a party to the agreement. Any claims arising for breach of the MOU being in the nature of withheld payments cannot attach upon the Defendant.

85. As to whether claims by the Purchasers of the sugar transported are valid and claimable as against the Defendant, the defendant submitted that as a general rule, a private carrier's liability with respect to late delivery of goods is limited to losses arising naturally from the breach of the contract, that is, damages as were at the time of the contract reasonably foreseeable as likely to result from such breach.

86. It was submitted that the test for recoverable damages is that of remoteness, as laid down in the decision of ***Hadley v. Baxendale (1854) 9 Exch. 341,*** that is that:

> (i) *the damages must flow naturally from the breach of contract; or*
>
> *(ii) the damages, although difficult to predict in the ordinary case, were reasonably foreseeable because the unusual circumstances were communicated to the defendant.*

87. The defendant submitted that it is not in dispute that by virtue of Clause 1 of the Quotation, the Defendant's Standard Trading Terms and Conditions were incorporated in the agreement as expressly stated in Clause 1 of the Standard Trading Terms as follows:

> ***"All and any business undertaken including any advice, information or service provided whether gratuitously or not Bollore Africa Logistics Kenya Limited is transacted subject to the conditions hereinafter set out and each condition shall be deemed to be incorporated in and to a condition of any agreement between the company and the customers. The company is not a common carrier and any dealings with goods are subject to these conditions."***

88. The legal effect of incorporation of such standard terms was enunciated in the case of ***Consolidated Bank of Kenya Limited v Securicor Security Services Kenya Ltd [2013] eKLR*** that the standard terms containing exemption and limitation clauses form part of the contract. The Court in the said case held as follows:

> ***"On the reverse of the order are 11 conditions of the contract which include exemption and limitation clauses. A document must be read and interpreted in its totality. That canon of documentary interpretation is well founded. I thus find that those conditions of contract including the exemption clauses formed part of the contract. This is clear in the language of clause 8 of the conditions of contract. It provides that the document constituted the entire contract between the parties."***

89. Under Clause 13 (iv) of the Standard Trading Terms and Conditions, the Defendant expressly excluded its liability with respect to consequential losses irrespective of the cause as follows:-

> ***"Further and without prejudice to the generality of the preceding sub-conditions, the company shall not in any event, whether under sub-condition (i) or (ii) or otherwise be under any obligation whatsoever for any consequential loss or loss of market or by fire, accident or delay or deviation however caused."***

90. It was submitted for the defendant that the claim for Losses as sought by the Plaintiff under the heading Claims by Purchasers in Uganda is not valid or payable for the following reasons:-

a. The said claims were not reasonably foreseeable at the time of entering into the contract and were not so contemplated;

b. The Defendant was not made aware of the sugar prices as well as duty exemption indicated to giving rise to the said losses. During the hearing, the Plaintiff's witnesses confirmed that the Defendant was not aware of the selling price of sugar in Uganda as well as the tax advantages at the time and as PW2 rightly testified, these are matters not ordinarily disclosed to a carrier;

c. The contract was to deliver the sugar which delivery was done albeit late for reasons outside the control of the Defendant;

d. There is no evidence before the court proving the said losses in any event as required of special damage claims;

e. The losses if proven would in any event be consequential in nature which losses the Defendant expressly excluded its liability.

91. The defendant submitted that the claim of USD 10,046,896.00 is unproven and in any event not recoverable within the meaning of the Agreement and hence excluded. In any event, the same was not specifically proved and should be dismissed entirely.

92. As to whether the Plaintiff is entitled to the reliefs claimed, the defendant submitted that the claims by the Plaintiff are unsupported and unmerited for the reasons of frustration and *force majeure* aforesaid and

that in any event, the Defendant endeavored to mitigate the risks by incurring additional costs to ensure the goods were delivered finally.

93. On traveling expenses of INR 202,963.00 and Accommodation of USD 1,819 the defendant submitted that while the Plaintiff produced receipts showing payment of accommodation and air ticket, they did not demonstrate the nexus between the need to incur the expenses and the Defendant's failure to deliver the goods on time. It was also submitted that while the witness testified that he came in Kenya to follow up on his cargo, he intimated that he did not see the press releases issued by KPA notifying parties of the challenges at the port. This implies that he was not travelling on account of the subject cargo. It was submitted that an analysis of the receipts produced as proof of travel expenses and accommodation further shows the expenses were incurred in the year 2013 more than one year after the cargo had been successfully delivered.

The Determination

94. Arising from the foregoing submissions of the parties, this court makes determination of the issue raised as follows:

I. Force Majeure/Act of God

95**.** *Force majeure* is a clause commonly found in commercial agreements, which states that one or both parties will not be liable for any delay in performance or non-performance of its obligations upon the occurrence of certain extraordinary events. The importance of this clause cannot be overstated. A common misconception is that the parties to a contract will be automatically relieved from performing their obligations if some kind of disaster occurs. However, the English law doctrine of "frustration" will only provide the parties with limited remedies and will only apply where performance is rendered impossible.

96. The term *force majeure* is not a term of art in common law although it is well known in continental legal systems. The doctrine of *force majeure* had its origin in French law based on the Roman doctrine of **v*is major***. The **v*is major*** concept was referred to as acts of God **See Tennents v. Earl of Glasgow (1864) 2 Macph HL 22** where the English House of Lords defined it as "a circumstance which no human foresight can provide against and of which human prudence is not bound to recognize the possibility." [Pages 1-8] and was limited to events of natural causes. The doctrine of *force majeure* has however been expanded to cover events induced by men and nature. In its simplest characteristics, *force majeure* refers to those situations outside the control of parties and which prevent them from performing the obligations assumed under the contract. These events may include the destruction of the subject matter, unavailability of the subject matter, death of a person, performance impossibility among others.

97. *Force majeure* may be said to have occurred "***when the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which the performance is called for would render it impossible. I promised to do this but I cannot due to some irresistible unforeseeable and uncontrollable event.***" See **Davis Contractors Ltd v Fareham Urban District Council (1956) 696 at 729 [Pages 9-50].**

98. According to McCardie J in ***Lebeaupin v. Richard Crispin & Co. (1920) 2 KB 714***, [Pages 51-63] the phrase "*force majeure*" is employed in many commercial contracts with increasing frequency and without any attempt to define its meaning or any effort to coordinate the phrase to other provisions of documents. Quoting from **Goirand's French Commercial Code, 2nd ed., p. 854**, he says the term "*force majeure*" is used with reference to ***"all circumstances independent of the will of man, which is not in his power to control, and such force majeure is sufficient to justify the non-execution of a contract."***

99. Under French law, the plea of *force majeure* will avail a party seeking to be excused from performance if he can show that the supervening event was unforeseeable, insurmountable, external and impossibility of performance persists. These conditions are somewhat recognized under English Common law and American Jurisprudence with arguable relaxed difference in the United States. The

courts will however give effect to the force majeure doctrine if parties have expressed it in their contract.

100. The words *"force majeure"* are, however, rarely unqualified. The type of circumstances envisaged by the parties will often be set out, so that those circumstances may apply to limit, extend or explain the meaning of "*force majeure*". Further the clause may refer to performance being "prevented", "hindered" or "delayed" by *force majeure*. A *force majeure* clause must therefore be construed with a close attention to the words which precede or follow it, and with a due regard to the nature and general terms of the contract.

101. If the reference to *force majeure* is indeed unqualified, for example, "subject to *force majeure*" or "*force majeure* excepted", then it is submitted in common law, performance of the relevant obligation must have been prevented by an event of *force majeure* and not merely hindered or rendered more onerous. However, there does not appear to be any requirement that the circumstances alleged to constitute *force majeure* should be unforeseeable, although the party seeking to be excused still bears the burden of proving that his non-performance was due to circumstances beyond his control and that there were no reasonable steps that he could have taken to avoid or mitigate the event or its consequence.

102. As a general rule, a party pleading *force majeure* must prove that the failure was due to an impediment beyond his control; and that he could not reasonably be expected to have taken the impediment and its effects upon his ability to perform the contract into account at the time of the conclusion of the contract; and that he could not reasonably have avoided or overcome it or at least its effects.

103. The logic of having a *force majeure* clause in a contract is to give one (or both) of the parties the right to cancel the contract. It is for the party seeking to rely on the *force majeure* clause to prove that the event in question falls within the clause, that the event has prevented or delayed its performance under the contract and (usually, but depending on the wording) that this is beyond its control.

104. The legal consequences of contractual *force majeure* may vary. Instead of the automatic discharge of the contract under the doctrine of frustration, parties may by contract agree to suspend the application of the doctrine of frustration and expressly provide for the consequences of supervening events. To this end, parties may agree that the effect of a *force majeure* event shall be to suspend the performance of obligations under the contract. It may also be provided that the effect of a supervening event shall be to extend the term of the contract or provide a platform for the renegotiation of the contract.

105. Now relating the concept of *force majeure* and frustration to these proceedings it is clear to me that the events mentioned by the defendant to have constituted *force majeure* or frustration or act of God cannot in their remotest form approximate to above attributes of *force majeure*. They merely disclose difficulties experienced in performing the contract by the defendant**.**

106. The only defence by the defendant is that the contract it entered into with the plaintiff was frustrated by force majeure circumstances. The defendant had in its defence identified factors which contributed to the alleged frustration. The first factor is that there were torrential rains that adversely affected port operations, bulk product deliveries, flooding and washed away sections of the road causing traffic congestion. Serious truck delays with cargo off-take being slowed and ships arriving at the port were delayed between 10 to 12 days before proceeding to berth taking another 4 to 5 days. The above factors are not supported by the evidence that is on record and which was produced in court. The torrential rains that are alluded to were actually reported in the dailies and the exhibit at page 6 of the defendant's bundle of documents dated **18th October 2011** confirms this. The newspaper cutting talks of rains having pounded the coastal region in the last 10 days which goes backwards to the 8th October, 2011. The evidence produced in court shows that in fact the first consignment consisting of 60 containers was discharged at the port of Mombasa on the 27th October 2011. That being the case, there is no nexus between the torrential rains and the transportation of the first 60 containers which were discharged on the **27th October 2011** and loaded on the **4th November 2011.** [See plaintiff's exhibit at pages 18[a] to 18[l]. The torrential rains, their effects and whatever else could have happened took place before the containers were discharged. It is the finding of this court that the defence of torrential rains is an

afterthought and is not valid. If indeed there were torrential rains which affected the transportation including destruction of roads, there was no way the defendant could load the containers to be transported by road on the 4th January 2011. As clearly admitted by the defendant, it had a discretion to use rail if the road transport was not available. In fact it used rail transport in performance of the contract and that has nothing to do with the torrential rains that were expected at the beginning of October 2011.

107. On the alleged power outage which affected documentation and equipment at the port, the evidence produced in court touching on power outages related to January 2012. [See pages 7-10 of the defendant's documents]. The bulk of the containers were discharged by the 3rd January 2012 and therefore there is no evidence whatsoever that any power outages affected the transportation of these containers. The same goes for the failure of Kenya Revenue Authority online system which is referred to in the articles that were produced in court and which related to the period January 2012.

108. On a term in the agreement that provided that the plaintiff had consented with the defendant that the shipments would not be received at the port of Mombasa all at once but in reasonable lot of volumes not exceeding 200 TEUS at a time, the defendant's defence is that the plaintiff offloaded the containers in very large quantities and therefore it was not able to handle these containers in these volumes within the agreed period of time. This defence too does not hold water in that at no single time did the plaintiff offload the containers exceeding 200 TEUS. The plaintiff's evidence at pages 18[a] to 18[l] is clear that in fact the containers were discharged as follows:

S/NO	DATE	NO. OF CONTAINERS RECEIVED
1.	27/10/2011	60
2.	16/11/2011	150
3.	21/11/2011	80
4.	29/11/2011	4
5.	5/12/2011	56
6.	12/12/2011	63
7.	3/1/2012	197

109. On the use of rail transport due to bulk of the goods, the defendant does not explain why road transport was used simultaneously with rail transport if the defendant had the capacity to move the containers by road as it maintains. On or about the 16th November 2011, the goods stopped moving by road and the rail mode of transport was adopted. The mode was used for a couple of days up to the 5th December 2011 when again the defendant reverted to road transport. No explanation is given for this apart from an allegation that there was congestion and alternative mode of transport had to be used.

110. The defendant does not explain why the rail transport was not used from the first day contemporaneous with road transport so as to perform the contract fully. The defendant had the discretion to use whatever mode of transport it deemed appropriate and this had nothing to do with the plaintiff. The simple explanation given for the defendant's breach of contract is that the defendant who actually drew the agreements itself and provided for the terms and conditions to govern the transportation of the goods, failed to appreciate the magnitude of what it was entering into. Possibly, the profit margin was what enticed the defendant to get into the contract only to realise that it did not have the capacity to move the goods as agreed. That blame falls on the defendant who is liable for the breach of the contract.

111. The next claim that the plaintiff has made is in respect of the various claims received by the plaintiff from the parties to whom the goods were to be delivered. The plaintiff submitted that this is not a

consequential loss to a contract but a loss flowing from the plaintiff's breach of contract with the recipients of the goods which breach was occasioned by the defendant's failure to honour its part of the bargain. The plaintiff submitted that it has produced documentary evidence to show that these claims have been made against it. However, placing evidence before the court does not mean proof of the same.

112. What is clear is that the defendant breached the contract it had with the plaintiff. Even if it could not deliver the goods within twelve (12) days, the defendant failed to show that it delivered them within a reasonable, delayed period.

Consequential Loss

113. Consequential loss is defined as losses that are not directly caused by damage but rather arising from results of such damage.

114. The general 'rule' under Common law for the recovery of damages following breach of contract was set down in **Hadley v Baxendale (1854) 9 Exch 341**. [Pages 104-112]. Recoverable damages are those either arising naturally or directly from the breach of contract ('direct loss'), or within the contemplation of the parties at the time they made the contract ('indirect' or 'consequential loss'). Other losses are irrecoverable as remote.

115. The second limb of loss in ***Hadley v Baxendale*** [Supra] covers situations where there is knowledge of 'special circumstances' at the time of the contract and a party has therefore been put on notice of a type of 'exceptional loss', which would not arise in the usual course of things, that by reason of that notice it has effectively undertaken to bear in the event of a breach.

116. It is the finding of this court that while the loss arising from a breach of contract is foreseeable and recoverable, the plaintiff in this case has not proved that there are any pending suits by the purchaser's against Rika to make this court make a finding on such issues. What is before the court are notices to file suit. Even these were not proved. Merely placing documents before the court is not a proof that the said documents exists or have any meaning. The court cannot be asked to make decisions which are speculative in nature. This matter has been in court since 2014. If there were real claims against the said Rika or the plaintiff, that fact would be self-evident by now, and the court would have been properly moved to make a finding thereon. It is the finding of this court that the alleged claims by "Purchasers" are speculative and not proved, and so the claim in this regard must fail. The same reasoning and finding applies to the plaintiff's claim to discontinued business by Rika. No basis was laid to conclude that the business between the plaintiff and Rika would be perpetual. No business relationship is ever permanent. Lastly, the plaintiff took time to send representative to Kenya to establish the cause of the breach. This court is satisfied that the costs incurred by the plaintiff in transport and accommodation have been justified and proved.

117. In the end this court finds that the plaintiff has proved its case against the defendant on a balance of probability and that the defendant breached the said transportation agreement. Consequently, Judgment is hereby entered for the plaintiff against the defendant as follows –

(a) USD 1,933,200 and INR 1,317,520.00 being

compensation for losses suffered by the plaintiff.

(b) USD 1,819.00 and INR 202,963.00 being refund of travel

expenses incurred by the plaintiff.

(c) Interest on (a) and (b) above at court rates from the date

of filing this suit until the date of payment.

(d) Costs of this suit shall be for the plaintiff.

That is the Judgment of the court.

E. K. O. OGOLA

JUDGE

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17TH DAY OF FEBRUARY, 2017

LADY JUSTICE G. NZIOKA

JUDGE