



**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**

**CIVIL CASE NO. 447 OF 2009**

**VAN DORN LIMITED ..... PLAINTIFF**

**VERSUS**

**EAST AFRICAN BREWERIES LIMITED ..... DEFENDANT**

**J U D G E M E N T**

1. This suit was commenced by a Plaint dated 21st May 2008 but filed herein on 24th June 2009. The same was amended on 3rd November 2011. The Amended Plaint sought 5 prayers as follows:

**“(a) Compensation for 10,250 units of beer impounded.**

**(b) (i) Kshs. 16,820,131.90 being the monies expended by the plaintiff from the point of purchase to the storage of the impounded consignment.**

**c. Loss of business and income pursuant thereto.**

**d. Costs of the suit.**

**e. (i) Interest on a (i) and b of 18% per annum compounded into monthly rests from the 28th June 2009 till payment in full.**

**f. Any other order that the Court may deem fit in the circumstances”.**

2. Simply put it was the Plaintiff’s case that it made an order to the Defendant for 10,250 beer units for exportation to Southern Sudan for sale in that country, all valued at Shs. 4,317,300/-. It maintained that the Defendant’s unilateral action of appending the national flag of Southern Sudan to the label of the beer resulted in the beer consignment being impounded by the Government of Southern Sudan. As a result of such impoundment, the beer consignment was warehoused for a considerable period of time leading to the Plaintiff incurring demurrage charges and a total loss as the contents of the consignment expired while under storage.

3. The Defence herein maintained that the Plaintiff, in making the said order, specified that the labels to the beer units should contain a congratulatory message to the newly inaugurated Government of Southern Sudan and bear the national flag thereof. The Defendant maintained that once the property in the goods passed to the Plaintiff, it became responsible for the consignment of beer and such was loaded into the Plaintiff’s trucks. Once the property in the subject consignment had been passed over to the Plaintiff, the Defendant maintained that it had no further responsibility with respect to the shipment, the handling of the goods, transport and insurance costs, duties and

- taxes payable both in Kenya and Southern Sudan as well as the said demurrage charges.
4. The hearing of the case commenced before this Court on 6th November 2013. PW 1 was **Stephen N. Iroha**, the Finance Director of the Plaintiff company. His witness statement which he adopted before Court detailed that in the year 2006 The Plaintiff had entered into business with the Defendant to distribute the latter's products, more particularly beer, within Southern Sudan. The Defendant had sent a pro forma invoice to the Plaintiff for 20,000 cartons of 300ml Pilsner dumpy bottles. Such included road transport, excise duty and deposit for VAT. The Plaintiff had deposited the sum of Shs. 23,801,840/-with the Defendant for the purpose of purchase, transportation and other outgoings for the Defendant's products. In June 2006, the Plaintiff placed an order with the Defendant for 10,250 units of beer out of the 20,000 cartons as aforesaid. When the consignment arrived at the border of Southern Sudan, the same was impounded and upon enquiry the Plaintiff was informed that the reason therefore was that the flag of Southern Sudan was appended to the beer bottles on the labels thereof.
  5. The Plaintiff had let the Defendant's note the position and, as a result, the Defendant had written a letter to the Government of Southern Sudan dated 3rd July 2006, explaining the position. The witness noted that despite the letter, the Government of Southern Sudan refused to release the consignment and the Plaintiff thereafter went to Court in Yei seeking for the consignment to be released to it. The High court had ordered that the lorries carrying of the consignment be released, the beer offloaded and stored in a warehouse at the Plaintiff's cost, under Police custody. Earlier, the Plaintiff had paid the requisite duty on the beer as well as the amount of the bond as required for the release of the lorries. In the witness' estimation the whole unfortunate exercise had cost the Plaintiff company in excess of Kenya shillings 16 million. The witness noted that the Plaintiff had ordered another consignment of beer without the national flag Southern Sudan on the label which had been delivered and it sold with no hindrances.
  6. Under cross-examination, PW 1 noted that the consignment of beer was ordered by the Plaintiff to be offloaded at Wanjuma Breweries in Juba, Southern Sudan. He agreed that there was no mention of Wanjuma Breweries on the pro forma invoice for the 20,000 cartons of beer. He confirmed that the Plaintiff had no knowledge about the flag of Southern Sudan and the congratulatory message on the labels of the bottles. He pointed to the letter at page 6 of the Defendant's documents addressed by the Vice-President of the Government of Southern Sudan to the Minister of Police and Security in Juba dated 7th July 2006 which was headed:

**“Re: Eastern African Breweries Ltd./ Wajuma Breweries Three Trucks Loaded with Beer Containers”.**

That letter made no mention of the Plaintiff Company and the containers referred to were part of the consignment being the subject matter of these proceedings. The letter referred to was an order from the Vice-President of Southern Sudan, which was not obeyed. At page 7 of the Defendant's documents, PW 1 noted a letter from the Director of Customs & Excise Department, Government of Southern Sudan dated 21st July 2006. The same was addressed to the Deputy Director of the Yei Customs Station where the consignment of beer was impounded. He was directed to conduct a normal clearance and in case of documentation disparities apply the appropriate fees. However the letter then contained the direction:

**“All SPLM Flags on bottles or packing materials to be removed before there are offered for marketing.”**

7. PW 1 noted that the authority who had impounded the beer disobeyed the order as the bottles were never released to the Plaintiff in order for the labels to be removed therefrom. As the order was never followed, the beer expired. The same had not been released to the Plaintiff to date and the orders were never obeyed or rescinded.

Upon re-examination, PW 1 confirmed that the Plaintiff was buying beer from Kenya Breweries and exporting it to Southern Sudan to a number of distributors. The Plaintiff had paid for the consignment as evidenced by the documents before Court. PW 1 noted that despite the Vice President's Order as aforesaid, the High Court in Yei had made no order for the release of the beer consignment. He

confirmed that the one problem was the issue of the Southern Sudanese national flag on the beer bottle labels. Finally, PW 1 noted that the pro forma invoice was headed Kenya Breweries Ltd but all the other correspondence contain reference to East African Breweries Ltd, the Defendant herein.

8. PW 2 was Mr. **Peter Mwandani Kimurwa** who is now the executive director of I. C. D. C. but in 2006 was working for the Defendant as its business development manager. At the time, the Defendant company was looking successfully at other markets of which Southern Sudan was one. He noted in his witness statement before Court, that in the year 2005, there was a feasibility study to have branded beverages, among them the Pilsner brand, to be distributed within Southern Sudan for the purposes of distribution and sale. The Defendant engaged the Plaintiff Company for such purposes. In May 2006, PW 2 confirmed that the Plaintiff did deposit the sum of Shs. 23,801,840/- for the purposes of product distribution. In the month of June 2006, the Plaintiff made an order for the first consignment to Southern Sudan. PW 2 confirmed that the Defendant appended the flag of the Government of South Sudan and a congratulatory message to its people. He had been informed of the impounding of the consignment and confirmed that he had written the letter dated 3rd July 2006 on the Defendant's company's letterhead addressed "to whom it may concern".
9. PW 2 went on to confirm that the first consignment was somewhat special in that the Defendant had put it in bottles which were on the way out. It was intended that the bottles would only go one way and the smaller bottle was more competitive than the bigger one. It was a new introduction and the Defendant Company worked on both the pricing and the presentation. The witness confirmed that the consignment was a one-off with the congratulatory message. It was not correct that the Plaintiff ascribed to the message and/or the labelling – that was the Defendant's business. The Plaintiff's role was to procure the product from the Defendant Company and convey it to the market in Southern Sudan. It was to buy the product at a price "X" convey it to the market and sell it at a price "Y" keeping the profit for itself. Under cross-examination PW 2 confirmed that he signed his original witness statement on 22nd November 2011 and that he was not induced or coerced into signing the same. He held a senior position and worked for East African Breweries Ltd as opposed to Kenya Breweries Ltd. It was a limited production and he confirmed that Wajuma Breweries was the end customer in Southern Sudan. The consignment was produced for them. He noted that in the last paragraph of his letter dated 3rd July 2006, he had detailed that every assistance do be given to Wajuma Breweries.
10. PW 3 was **Kenneth Gachohi Mwangi**, an auditor by profession. He was the external auditor for the Plaintiff Company. He had perused the Plaintiff's Further List of Documents dated 21st January 2013. Such contained a computation or calculation as to the losses suffered by the Plaintiff as regards the consignment referred to in June 2006. The figures contained in the calculation of losses had been given to him by the directors of the Plaintiff Company and he was asked to check the same against documents produced to him. He noted that the actual cost of the consignment was Shs. 10,327,731.00 including costs of the beer, customs duty and off-loading. There were also incidental costs including air tickets, living expenses and warehouse costs totalling Shs. 3,992,400.00. Based on the projected sales price, PW 3 noted that the profit would have been Shs. 13,284,000.00 but taking into account expected sales, the income lost would have been Shs. 2,906,269/-. Under cross examination, DW 3 confirmed that he was a C. P. A. Kenya qualified in 1997. He confirmed that the document produced before Court as above was an excerpt from the audited accounts of the Plaintiff Company whose financial year ran to 31st December 2006. His statement would have been included in the accounts for the Plaintiff Company as at 31st December 2006. He confirmed that the document put before court was a certificate prepared for the purposes of this suit and was not part of the audited financial statements. He further confirmed that there was no similar statement in the audited accounts of the company for the year ended 31st December 2006. In arriving at the statement, PW 3 had relied on payment vouchers and receipts as well as bank statements with regard to other payments. Finally, PW 3, in re-examination, confirmed that he prepared the document for Court in 2009 as the directors of the Plaintiff Company required the same to support the consignment.
11. At the conclusion of the Plaintiff's case, after PW 3's evidence had been taken, Mr. Odera, learned counsel for the Defendant, detailed to Court that he did not propose to call any witnesses but would rely upon submissions. As a result, the Plaintiff's written submissions were filed in Court on 9th June 2014. The Plaintiff detailed the contents of its Plaintiff as well as the prayers

thereof. The Plaintiff then laid out the evidence as put before court by the three Plaintiff witnesses. Thereafter, the Plaintiff detailed that it was clear from the such testimony as to the following:

- “1. The plaintiff had no input, contribution and/or control over the branding of the defendant’s products thus did not participate in the affixing of the flag on bottles.**
- 2. The plaintiff had no authority to alter/change, and/or request any of the personal addendums to the labeling of the defendants brands.**
- 3. The product was impounded as a result and solely on the basis of having been affixed with the flag of the government of South Sudan.**
- 4. The consignment remained in the possession of the defendant and no property in the same passed to the plaintiff because the consignment did not arrive at its warehouse or at the intended destination.**
- 5. The Plaintiff did incur expenses and losses from the impounding of the consignment and the subsequent lack of sale of the product”.**

The Plaintiff then went on to submit that the discernible points of law raised through the pleadings and the evidence herein were firstly, whether there existed an agreement as between the Plaintiff and the Defendant. Secondly, whether the goods conformed to the implied warranty in the contract. Thirdly, whether there was a transfer of the property and the goods from the Defendant to the Plaintiff. Fourthly, whether the claim was time barred and lastly, whether the Plaintiff deserved an award of interest on the sums claimed as special damages.

12.The Defendant’s submissions were filed herein on 16th June 2014. As for the Plaintiff, the Defendant summarised the pleadings herein as well as the evidence of the three Plaintiff’s witnesses. As regards the law, the Defendant submitted that **section 20 a.** of the *Sale of Goods Act* applied to the transaction as between the Plaintiff and the Defendant. It was quoted as follows:

**“Unless a different intention appears, the following rules apply for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer:**

- a. Where there is a conditional contract for the sale of goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery of both be postponed.”**

It was the Defendant’s submission that in the sale of specific goods that were already in a deliverable state, the property in those goods passed at the time the contract was made.

13.Further, the Defendant went on to suggest that as regards the legal effect of the passage of property, **section 22** of the *Sale of Goods Act* applied which detailed as follows:

**“Unless otherwise agreed, the goods remain at the seller’s risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer the goods are at the buyer’s risk whether delivery has been made or not:**

**Provided that:**

- i. Where delivery has been delayed through the fault of either party the goods are at the risk of the party at fault with regards any loss that might not have occurred but for the fault.**
- ii. Nothing in the section shall affect the duties or liabilities of either the seller or buyer as a bailee or custodian of goods of the other party”.**

The Defendant submitted that the prima facie rule was that risk passes with the property and referred to **Benjamin's Sale of Goods para 6-001** to support that statement. It maintained that the question of risk arises when the goods that have been sold are lost, destroyed, damaged or deteriorated and it is necessary to decide whether the buyer or the seller should bear the loss. If the property has passed to the buyer, then he must nonetheless pay the price and bear the loss.

14. The Defendant submitted that, the property in the beer consignment passed when delivery was taken by the Plaintiff from Kenya Breweries Ltd and signed for. Having accepted the consignment, the Plaintiff assumed the risk. As regards the compensation and remedies sought by the Plaintiff, the Defendant submitted that the consignment of beer was impounded by the Police of the Government of Southern Sudan which neglected to comply with the order of the Vice-President. As a result, the immediate and proximate cause of any money expended by the Plaintiff and its losses was placed squarely at the door of the said Police. There was no Nexus between the Plaintiff and the Defendant with respect to the loss that the Plaintiff had suffered and its cause of action lay as against the said Police. The Defendant raised two further points in its submissions firstly, that the consignment being the subject matter of the Defendant's said letter dated 3rd July 2006 was in respect of a consignment of beer produced purposely for Wanjuma Breweries and not for the Plaintiff. Secondly, payment made in respect of the consignment which forms the basis of the Plaintiff's claim was made to Kenya Breweries Ltd and not to the Defendant Company.

15. The first issue as raised by the Plaintiff in its submissions was whether there was a contract as between the parties hereto. The position is slightly confusing in that the pro forma invoice dated 26th April 2006 in the amount of Shs. 23,801,840.00 was raised by Kenya Breweries Ltd and the evidence of PW 1 shows that the above amount, as detailed in his witness statement dated 17th October 2011, was deposited with "the Defendants". Further, the statement dated 30th June 2006 included in the Plaintiff's bundle of documents before Court dated 12th May 2010, clearly shows the Plaintiff in account with Kenya Breweries Ltd. However, at paragraph 3 of the Statement of Defence to Amended Plaintiff dated 16th November 2011 the Defendant states:

**"...it is the Defendant's case that by an oral contract, the Plaintiff purchased beer from the Defendant for export to Southern Sudan."**

As the Plaintiff has stated in its submissions, the oral contract between the parties is admitted by the Defendant and certainly the evidence of PW 2 indicated that the initiative as regards sale of product to Southern Sudan as well as the engagement of the Plaintiff company as transporter, lay with the Defendant company and not its associate, Kenya Breweries Ltd. As a result, I find that the Defendant cannot deny the contract as between the parties.

16. The next point raised by the Plaintiff was whether the goods conformed to the warranty implied in the contract. It referred to **section 16** of the *Sale of Goods Act* in this connection, the same reads as follows:

**"16. Subject to the provisions of this Act and of any Act in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows –**

a. **where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for that purpose:**

**Provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose;**

b. **where goods are bought by description from a seller who deals in goods of that description**

**(whether he be the manufacture or not), there is an implied condition that the goods shall be of merchantable quality:**

**Provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which that examination ought to have revealed;**

- c. an implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade;**
- d. an express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith”.**

With due respect to the Plaintiff as regards the contents of section 16, I consider that the goods supplied by the Defendant did conform to the warranty implied in the contract. **Section 16** in the marginal note quite clearly details that there is no implied warranty as to fitness except in certain cases. To my mind, the goods supplied by the Defendant were the beer for sale in the Southern Sudanese market. I do not think that the fact that the Southern Sudan national flag was detailed on the bottle labels amounted to a defect as regards the warranty to fitness.

- 17. Paragraph 10 of the Defence makes a suggestion that the Plaintiff made its demand for action after a considerable period of time and that such demand was an afterthought that lacked any legal basis. The Plaintiff submitted that the claim was made within a reasonable time as contemplated by the *Limitation of Actions Act*. In this regard, I do not find that the claim was time barred as, being brought under contract, the limitation period under the said Act was 6 years. The subject goods were impounded towards the end of June 2006 and the suit herein was filed in June 2009 well within the six-year limitation period.
- 18. The pertinent issue, so far as this matter before Court is concerned, is whether and when there was a transfer of property in the goods. The parties considered that **sections 19, 20 and 22** of the *Sale of Goods Act* applied in the circumstances relating to the contract between them. It was the Plaintiff's case that the property in the goods that it had purchased from the Defendant was never transferred to it. The Plaintiff maintained that at the time of the purchase, it was required to pay for the transportation of the goods from the Defendant's premises to Juba in Southern Sudan. This, it maintained was clear from the pro forma invoice. However, it is to be noted that the said pro forma invoice was in the name of Kenya Breweries Ltd not the Defendant Company. The Plaintiff maintained that the evidence of PW 2 showed that the Defendant engaged their own contractors to transport the consignment of beer to the Plaintiff's premises in Juba, Southern Sudan. The Plaintiff maintained that the conduct of the Defendant was such as to prevent the diversion of the goods back to the Kenya market by the Plaintiff and thus the property in the goods was deliberately withheld from being transferred.
- 19. In this regard, the Plaintiff referred to the Ugandan case of ***Bwiriza v Osapil (2003) 1 EA 30*** in which the Supreme Court in Kampala had found that the general rules as to the passing of property in goods could be modified by the intention of the parties as evidenced by their conduct. This Court has no quarrel with that finding. What it has difficulty in accepting is the Plaintiff's submission that the Defendant's action of transporting the goods itself or through its contractors and accepting refundable Excise Duty and VAT for the goods, clearly showed that it retained ownership of the same. With due respect to the Plaintiff, I don't think that is what the witnesses' testimony showed. The telling evidence came from PW 2 who clearly stated that the role of the Plaintiff was to procure the product from the Defendant and convey it to the market in Southern Sudan. He noted that it was the Defendant Company's policy to operate through distributors. I would repeat what he said verbatim:

**“It was to buy the product at a price ‘X’, convey it to the market and sell it at price ‘Y’ keeping the profit for itself.”**

- 20. In my view, ‘procurement’ in this instance means ‘purchase’ and I concur with the submissions of the Defendant when it maintained that the provisions of **section 20 (a)** of the *Sale of Goods Act*

(supra) applied to the contract between the parties. I find that the Plaintiff purchased specific goods from the Defendant in a deliverable state and as a result, the property passed to it when the contract was made. As is detailed in **Benjamin's Sale of Goods 4th Edition paragraph 6-002**:

**“Risk follows property. ‘As a general rule,’ said Blackburn J. in *Martineau v. Kitching*, ‘res perit domino, the old civil law maxim, is a maxim of our law; and when you can show that the property passed, the risk of the loss prima facie is in the person with whom the property is’.”**

I also concur with the Defendant in its submission to the effect that the Plaintiff's claim here is against the Government of Southern Sudan (its Police) for the wrongful impounding of the beer consignment after Orders had been issued for its release.

21. As a result of the foregoing, I do not find that the Plaintiff has proved its case as against the Defendant. The Amended Plaint dated 3rd November 2011 is hereby dismissed with costs to the Defendant.

**DATED and delivered at Nairobi this 17<sup>th</sup> day of July, 2014.**

**J. B. HAVELOCK**

**JUDGE**