REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 264 OF 2009

CROWN COMPANY EGYPT.....PLAINTIFF

VERSUS

AFHAM TRADING LIMITED.....DEFENDANT

JUDGMENT

1. The case before me was brought by **CROWN COMPANY EGYPT,** (the plaintiff) against **AFHAM TRADING LIMITED** (the Defendant).
2. It was the plaintiff's case that on 13th March 2008, the plaintiff and the defendant entered into a contract pursuant to which the plaintiff was to buy Tea Dust from the Defendant.
3. According to the plaintiff, the particulars of the tea which it was buying from the defendant were as follows;

"i) Commodity - Tea

ii) Origin - Kenya

iii) Grade - Dust No. 4

iv) Price per MT - USD 2460

v) Total value - USD 405,250.56

vi) Quantity in kgs - 164,736

vii) Payment terms - Net cash against Document on first presentation".

4. The plaintiff paid to the defendant the full purchase price of **USD 405,250.56.**
5. But when the plaintiff inspected the tea which the defendant sold and delivered to it, the plaintiff found that the tea did not conform to the quality and specifications in the contract.
6. According to the plaintiff, the tea in issue was an inferior quality and also did not meet the Egyptian market's specifications.
7. The plaintiff's claim was that when they found the tea to be a lower quality than had been agreed upon, they asked the defendant to take back the tea, and to thereafter refund the money which the

plaintiff had paid. The plaintiff's demand included a refund of all the *"related and attendant costs"*.

8. In paragraph 10 of the plaint it was asserted that the tea in issue was tested at the plaintiff's offices, in the presence of one of the defendant's officials. The said test is said to have verified that the tea was bad.
9. According to the plaintiff, once that test verified that the tea was bad, the defendant undertook to ship to the plaintiff another consignment which was acceptable to the plaintiff.
10. Notwithstanding the said undertaking, the defendant is alleged to have proceeded to repudiate its undertaking.
11. Indeed, the defendant is said to have refused to take back the *"bad tea"*, and also to refund the money which the plaintiff had paid.
12. It is those actions which prompted the plaintiff to sue the defendant.
13. The basis for the claim is said to be the defendant's breach of the contract between it and the plaintiff. The breach of contract is said to have caused the plaintiff to suffer loss and damage.
14. In the result, the plaintiff prayed for judgment against the defendant for the following reliefs;

> "*a) Refund of **USD 405,250.56.***
>
> *b) Refund of Taxes and Customs of **USD 37,000.***
>
> *c) Bank interest Charges.*
>
> *d) An Order directing the plaintiff to ship the tea to the Defendant at the Defendant's expense.*
>
> *e) Interest on (a) and (b) at court rates.*
>
> *f) Costs.*
>
> *g) Any other or further relief as this Honourable Court may deem fit and just to grant"*.

15. In answer to the suit, the Defendant filed a Defence denying all

liability.

15. As regards the contention that the 164,736 kilogrammes of tea were for consumption by the Egyptian market or any particular market, the Defendant stated that there was neither an express nor an implied term in the contract between the two parties.
16. According to the Defendant, they shipped to the plaintiff, tea that matched the specifications in the contract between the parties.
17. It was the defendant's case that the tea was free from any defect which could have made it un-merchantable.
18. The defendant accused the plaintiff of storing the tea in un-hygienic circumstances. The insinuation was that if the tea became un-merchantable, that could only be attributed to the manner in which the plaintiff handled the consignment after it reached Egypt.
19. The defendant trashed the testing by the Tea Board of Kenya, as an attempt to arm-twist it, into refunding the plaintiff. The defendant's reason for so saying was that the Board did not give it any hearing or any proper hearing or notice of proceedings at which the Board made its findings.
20. The plaintiff is accused of using its political connections in Egypt to exact pressure on the Kenyan Embassy in Egypt and also on the Tea Board of Kenya, to try and compel the defendant to refund the purchase price.
21. As far as the defendant was concerned, it did not breach the contract. Therefore, it believes that the plaintiff's claim ought to be dismissed with costs.
22. During the trial, the plaintiff called three (3) witnesses whilst the defendant called four (4) witnesses.

23. **PW1, KHALED MORTADY ABDEL HALIM YOUSSEF**, testified that he worked with the plaintiff at the material time.
24. He said that the plaintiff had brought tea from the defendant for eight (8) years. During that whole period, the plaintiff had never had any complaint against the defendant.
25. The first and last complaint by the plaintiff against the defendant stemmed from the contract dated 13th March 2008.
26. According to PW1, the contract specified that the defendant was to supply *"Kenya Tea Dust No. 4"*. However, the defendant failed to do so.
27. When the plaintiff complained, the defendant sent two (2) of its officials to Egypt, to verify the product. Youssef (PW1) said that the 2 officials who were sent to Egypt by the defendant were **FAHIM AWADH BAYUSUF (DW1) and STEPHEN ONYANGO (DW4).**
28. It was the evidence of Youssef that both DW1 and DW4 inspected the tea consignment in Egypt. He said that those two officials;

> *"found that the same was not matching with the sample we gave them"*.

29. They are said to have agreed to exchange that consignment with the right one.
30. PW1 told the court that **DW1** and **DW2** told the plaintiff to pay the cost of shipping back the *"bad tea"* and also for taking the new consignment from Kenya to Egypt.
31. But PW1 went on to testify as follows;

> *"However, the plaintiff never shipped since the defendant told us not to waste our time to ship the tea"*.

32. As a result, the defendant lodged a complaint with the Kenyan Embassy in Cairo. Staff from the Embassy visited the plaintiff's premises in Cairo and they took samples of the tea.
33. The Embassy caused the samples to be sent to the Tea Board of Kenya, for assessment. SGS also tested the said tea.
34. PW1 testified that both the Tea Board of Kenya and SGS confirmed that the tea was not good.
35. The Tea Board of Kenya is said to have given three (3) options to the defendant, as follows;

> *"i) Afham Trading replaces the problematic consignment by*
>
> *either engaging in further blending towards improving the quality to be within the standard, or*
>
> *ii) Supply a fresh consignment to Crown as per standard.*
>
> *iii) Receive back the consignment and refund Crown Company.*
>
> *Failure to reach an amicable settlement should result in Crown Company seeking legal redress against Afham Trading"*.

36. It was the testimony of Youssef that the defendant did not take notice of the options given by the Tea Board of Kenya. In the circumstances, said Youssef;

> *"That tea consignment is still in Cairo. We have not been able to sell the consignment in the Egyptian market"*.

37. That evidence was tendered by Youssef on 14th July 2010.
38. On that same date Youssef continued with his evidence and said;

> *"Eventually, we filed the suit against the defendant. A portion of the consignment was sold at a throw-away price. We have managed to sell away 140 tons. We sold them from 11th February 2010. On that day, we sold 60,060 kgs at US $ 73,873.80.*

On 12th June 2010 we sold 80,190 kgs at US $ 60,142.50. We expect the defendant to pay the balance of the total cost of the tea, damages, refund of taxes.

I also pray for our costs that is legal charges".

39. During cross-examination, Youssef said that the order was made verbally.
40. He also said that although the plaintiff employs some tea tasters, none of them tested the tea and wrote a report. His reasoning was that such a report could be deemed to be biased.
41. **PW2, CHARLES NDEGWA KIMANI,** was an employee of **VENUS TEA BROKERS,** Mombasa.
42. PW2 testified that a **MR. JAMES NGUGI (PW3)** contacted him from the Tea Board of Kenya, and requested him to be a part of a panel that was to examine some samples of tea.
43. PW2 joined the panel which then conducted the testing.
44. According to **KIMANI (PW2)** the sample *"A"* did not conform with the standard of tea exported to Egypt. Sample *"A"* was said to be the one obtained by the staff of the Kenyan Embassy in Egypt, from the consignment at the plaintiff's warehouse.
45. Kimani described that sample as being of an inferior standard.
46. It was notable that during cross-examination Kimani said;

"I have no document from Tea Board of Kenya setting the standard of tea exported to Egypt.

I know Egyptians blend tea for future consumption once exported".

47. **PW3, JAMES MUCHOKI NGUGI,** was a Trade Promotion Executive, working with the Tea Board of Kenya. His duties included the promotion of Kenya, Tea, both locally and internationally. He also monitored tea trade activities in Mombasa.
48. In June 2008, the Board received the plaintiff's complaint against the defendant; the said complaint was communicated to the Board by the Kenyan Embassy in Egypt.
49. Ngugi testified as follows, concerning the complaint;

"*Crown Company complained that they received a consignment of tea that had a bad taste and smell. It did not meet the Egyptian Standards"*.

50. The Board contacted the defendant about the plaintiff's complaint, and the defendant responded that the claim was unfounded.
51. It was at that point that the Tea Board of Kenya asked the Kenyan Embassy to provide the Board with samples of the tea.
52. When the samples were received, the Board constituted a panel of experienced *"Tea Tasters"*, to taste the tea.
53. According to Ngugi;

"*The panel found that there was a possibility of adulteration of the tea with Argentinean tea"*.

He went on to add that;

"Previously, there had been verbal complaints in Egypt of poor quality tea from Kenya. In this case, there was comprehensive evidence of poor quality tea flooding the Egyptian market".

54. Considering that Youssef had said that they had not been able to sell the tea from the defendant until long after the Tea Board of Kenya had suspended the defendant, it is not clear what Ngugi was basing his conclusion that poor quality tea had flooded the Egyptian market.
55. In any event, Ngugi confirmed to the court that he was not present when samples of tea were drawn from the plaintiff's warehouse. He was also unaware of the identity of the person or

persons who actually drew the said samples.

56. When Ngugi was being cross-examined, he said that he did not have any document that indicated the standard of tea that should be exported to Egypt.
57. That piece of evidence leads to the question as regards what constitutes good or acceptable standards of tea for the Egyptian market. That is even more so when Ngugi confirmed that he had never worked in Egypt.
58. Furthermore, Ngugi was aware that some of the companies that sold tea in Egypt, from Kenya, were Van Rees and Afham (the defendant). According to Ngugi;

> "*They were selling different grades and parameters. It depended on the market segments they were targeting. Different segments consumed different standards of tea*".

59. After Ngugi testified, the plaintiff closed its case.
60. **DW1, FAHIM AWADH AHMED,** worked as a manager at Afham Trading Limited. He was a superior, in charge of buying and selling tea. They bought tea at the Mombasa Auction and later sold it to customers in Egypt, Iran, and Greece, among other countries.
61. Fahim said that neither the Government of Kenya nor the Government of Egypt fixed the standard of the tea. His evidence was that the standards were fixed by the parties who were buying and those selling tea.
62. In relation to this case, Fahim testified that the plaintiff wanted to buy *"Kenya Tea Dust No. 4"*.
63. As the tea being purchased by Afham came from different farms in Kenya, there was need to have the tea blended. The said blending was done by **UFANISI FRIGHTERS** under the supervision of Afham's Tea Manager, **STEPHEN ONYANGO (DW4).**
64. After the tea was blended, it was inspected by **KEPHIS,** the Kenya Plant and Health Inspectorate Service.
65. **KEPHIS** inspected the tea in issue and then issued a certificate indicating that the tea in issue was in conformity with the current health standards of Kenya.
66. **KEPHIS** also certified the tea to be fit for direct human consumption and also free from radioactive contamination.
67. Thereafter, the tea was exported by Afham to Crown Company, Egypt.
68. But when the tea was received in Egypt, Crown phoned Afham to complain that the tea was not fit for human consumption, and that it had *"detergent like taste"*.
69. Afham received a sample of the tea from Crown and had it tested by an independent Tea Taster, **SAMUEL OTIENO (DW2).** The said Taster found the tea to be of satisfactory quality with good strength and *nice aroma.*
70. But Crown still insisted that the tea had the smell of detergent and was not fit for human consumption. That prompted Fahim and Stephen Onyango to travel to Egypt.
71. On arrival at Giza, they found the tea stored in an old godown. There was waste water around the godown, and said waste water had a foul smell.
72. Fahim and Onyango agreed with Crown that the two parties, Fahmy and Crown would test the tea together. At that time those who were present included Youssef (PW1); his father Abdalla; a Taster with Crown; Fahmy and Onyango.
73. However, Abdalla then stopped the Taster working with Crown from participating in the joint testing of the tea.
74. Onyango proceeded to test the tea and he found it to be o.k.
75. This piece of evidence is inconsistent with that given by Youssef, who had said that when Onyango and Fahmy tested the tea, they found it to not match the sample which Crown had given to Afham.
76. As far as Fahmy was concerned, the complaint by Crown was probably triggered by price fluctuations. The prices in Kenya had fallen, and therefore Crown were not going to make the profits they had anticipated.
77. **DW2, SAMUEL ODHIAMBO OTIENO**, was the Managing Director of **CHOICE TEA BROKERS LIMITED,** Mombasa.
78. His duties included tasting tea, a task that he had undertaken for about 30 years.
79. He explained that tea is tasted to determine its quality.

80. When tasting tea, the black tea is infused, by putting it in hot water. It is then served, to get the liquor only.
81. The blacker the appearance of the leaf, the better the quality. But the size of the leave also affects quality.
82. The liquor is then checked for brightness, colour and the body of the tea. The brighter the tea, the better the quality.
83. Other ingredients which count towards quality are the thickness of the liquor; the briskness; strength; pungency; aroma level (or flavor); and mouth feel.
84. Using those skills and experience, DW2 (Samuel) tested a sample of tea which he was given by Afham. He found that the leaf was satisfactory in appearance. The liquor was good; The tea had a good tea aroma/flavour. Both the colour and body were good.
85. Samuel was able to tell, from the tasting, that the tea was from Kenya.
86. The tea tasted by Samuel did not have the taste of detergent or any bad smell.
87. Samuel said that Argentinean tea had different characteristics from Kenyan tea. He was therefore able to conclude that the tea did not come from Argentina.
88. During cross-examination, Samuel said that the tea he tasted was taken to him by the manager of Afham. Therefore, Samuel did not know where exactly the manager got it from.
89. **DW3, ISAAC KARONGE,** worked for **UFANISI FREIGHTERS (KENYA) LIMITED.** Amongst the jobs undertaken by Ufanisi, was the clearing, forwarding and warehousing of tea, on behalf of Afham.
90. Isaac explained that after Afham bought tea at the Mombasa Auction, Ufanisi would collect the tea and transfer it to their warehouse. Isaac would then verify that the tea corresponded with that which Afham had bought at the Auction.
91. In relation to the tea in issue in this case, Isaac blended it. He explained blending to be the exercise of mixing various batches of tea, so as to obtain a uniform quality. Hs words were that;

> "*Blending harmonizes the teas so as to obtain a particular standard"*.

92. After blending the tea, Isaac gave a sample to Afham who then verified the standard. Thereafter, the tea was packaged and then shipped out.
93. **DW4, STEPHEN OTIENO ONYANGO,** was an agronomist. He also described himself as a *"Tea Taster"*.
94. At the material time, **PW4** (Stephen) worked for Afham. By virtue of his work, Stephen knew the standard of tea which the Egyptian market required. He said;

> "*Once the client picked a particular sample, we supplied tea in accordance with the sample"*.

95. In this case, the tea which the defendant sold to the plaintiff was said to have matched the sample provided by the plaintiff.
96. According to Stephen, when the tea reached Egypt, it was inspected by the Egyptian authorities before being released from customs.
97. When the plaintiff sent to Afham a sample of the allegedly contaminated tea, Stephen found it to have a foreign smell.
98. A visit to the warehouse where the plaintiff had kept the tea revealed to Stephen that there was a very bad smell of paint and that the warehouse was very dirty.
99. At the request of Stephen, the plaintiff obtained five (5) samples of tea from the consignment which the defendant had sold to them. The intention was to test the samples jointly.
100. However, although the Taster of Crown was also present, the Managing Director of Crown did not allow him to taste the samples.
101. A suggestion was made by Stephen to have the samples tested by SGS. But Crown rejected that suggestion.
102. When Stephen tasted the samples, he fund that the tea was in accordance with the tea which Afham had sold to Crown.
103. During cross-examination, Stephen reiterated that;

"The contract for the supply of tea was bound on the quality of tea offered as per sample".

104. After Stephen testified, the defendant closed its case.
105. Thereafter, the parties filed their respective written submissions.
106. In determining this case, I find that the following are the issues which the court must delve into:

a) What were the specifications of the quality of the tea which the parties agreed upon?

b) Were there any other implied terms and conditions as to the said quality? If so, what were those implied terms and conditions?

c) Did the defendant supply tea that was in conformity with the terms of the contract?

d) Has the plaintiff suffered any loss and damage that is attributable to the actions or omissions of the defendant? If so, what is the quantum of such loss and damage?

e) Who should pay the costs of the suit?

107. In its submissions, the plaintiff has asserted that it gave to the defendant;

"…specifications for the tea it wanted the Defendant to supply it with. Additionally, the plaintiff sent a sample of the said tea to the Defendant before shipment".

108. From the evidence tendered by both parties, there is concurrence that the specifications of the tea, pursuant to Contract No. **CM/001/05** were;

164,736 kilogrames of *"**KENYA TEA DUST** No. 4"*, at a cost of US $ 2460 PER Metric Ton.

109. Secondly, both parties are in agreement that the plaintiff, **CROWN COMPANY EGYPT** provided a sample of the tea which it wanted the defendant to supply to the plaintiff.
110. I find that there is no standard of tea which is generally described as *"**KENYA TEA DUST NO. 4".***
111. That description was coined by the parties herein to describe the product which they had agreed upon. Consequently, the most significant specification of the tea which the plaintiff was buying from the defendant was the sample.
112. The plaintiff is a company based in Egypt. About that fact, the defendant was well aware. Indeed, the defendant knew that the tea it was selling to the plaintiff was to be shipped from Mombasa to Egypt.
113. However, there was no express or implied understanding that the tea was for sale in the Egyptian market. Whilst it is probable that tea which was imported into Egypt would be consumed within that country, it is also possible that the tea could be re-exported to other markets.
114. And even if the tea was to be consumed within Egypt, it may have undergone changes before it was released into that market. I so find because Youssef made it clear that after Crown purchased tea, they would usually blend it.
115. The plaintiff did not lead any evidence to prove that there was a specific standard or quality of tea for the Egyptian market. If anything, the plaintiff's advocates submitted that;

"Your Lordship, all the witnesses who testified in this suit, both for the plaintiff and the Defendant, were in agreement that the tea is blended to meet specific purposes…"

116. I find and hold that the contract herein was for sale by sample, to meet the specific purposes of the plaintiff.
117. There was never any express or implied warranty that the tea would meet some un-defined quality for the Egyptian market.
118. When the plaintiff said that the tea was bad, that would be so generalized a term that it would not make sense.
119. In order to prove that the tea which the defendant provided was not in keeping with the terms and conditions of the contract, the plaintiff should have proved that the said tea did not conform to the sample.
120. The plaintiff has submitted that there was a deviation from the quality of tea which the defendant was required to provide.
121. Did the evidence support that submission?
122. The report prepared by five members of the panel set up by the Tea Board of Kenya held that the sample of tea, allegedly obtained from the consignment which the defendant sold to the plaintiff was definitely below the standard.
123. As already stated above, there is no set standard quality of tea against which all tea could be tested. And the panel did not purport to compare the three (3) samples to a set standard quality of tea. This is what the panel said;

> *"Therefore, if sample B and C fairly represent the standard for the market, then Sample "A" is definitely below the standard and hence, Crown Company are justified in their complaint".*

124. In effect, the panel did not compare the tea in issue to the sample which Crown had given to the defendant at the material time.
125. The so-called *"problematic tea"* was compared to a consignment which Afham had delivered in January 2008, and also to a consignment which another Kenyan Company named LAB, had delivered in June 2008.
126. Whereas that *"problematic tea"* may have been of a lower quality than the tea in those two consignments, there is nothing to show that it was not in conformity with the sample which Crown ordered from Afham on 9th April 2008.
127. I find that the plaintiff has not discharged the onus placed on it, to prove that the defendant breached the terms of the contract between it and the plaintiff.
128. However, if the plaintiff had proved that the defendant had breached the contract, the Court would have been unable to order the plaintiff to return the tea to Kenya, at the expense of the defendant. I so find because the plaintiff testified that the tea was eventually sold, albeit at a price that was much less than the plaintiff had anticipated.
129. Secondly, if the court had found that the defendant had breached the contract, it would have awarded to the plaintiff the sum of **US $ 271,234.26.** That sum is arrived at by deducting from the **US $ 405,250.56** (which the plaintiff paid), the sum which the plaintiff made upon the sale of the tea. Youssef had said that the plaintiff made US $ 134,016.30 from a sale of a total of 140,250 Kgs of the tea.
130. Incidentally, the fact that the plaintiff was able to sell the tea which it had earlier alleged to be *"bad"*, also brings into doubt the plaintiff's complaints. If the tea was unmerchantable or unfit for human consumption, it would be expected that it would have been destroyed.
131. The fact that the plaintiff was able to sell the tea at lower prices than the plaintiff had anticipated, appears to lend some credence to the defendant's contention that the complaint was raised because the price of tea had dropped, in Kenya, after the plaintiff bought the consignment in issue.
132. The plaintiff did not lead evidence to prove its claim for interest at Bank rates. Therefore, even if the court had found the defendant liable, there would have been no factual or legal foundation for awarding interest at Bank rates.
133. In any event, the phrase *"Bank rates"* or *"Bank Interest Charges"* were so indeterminate as to be incapable of being granted. In my considered view, when a party was claiming for interest on any specified sum, the party should lead evidence to prove the rates being claimed, unless the same is *"court rates"*. Commercial rates of interest or Bank rates of interest need to be pleaded and then specifically proved if a party wishes to be awarded the same. The need to do so stems

from the fact that in Kenya's liberalized economy, financial institutions are not obliged to charge interest that was pre-determined by law. Therefore, unless the party claiming interest led evidence to prove the applicable rates of interest that they believed they were entitled to, an award of *"Interest at Bank rates"* would be incapable of being enforced.

134. Unless rates were determined and incorporated into the judgment, there would be need for further evidence to be led after the court had delivered its judgment: and that would be improper. A judgment ought to determine all the issues in dispute.

135. Reverting to the issues before me I now answer them as follows;

a. *The specifications of the quality of the tea was "Kenya Tea Dust 4".*
b. *The other implied terms and conditions as to the quality of the tea were that the tea would be fit for human consumption and was thus merchantable.*

> *There was no implied term or condition that the tea would be in conformity with the indeterminate or undefined standard of tea, in the Egyptian market.*

c. *The defendant insists that it supplied tea that was in conformity with the sample given to it be the plaintiff. The plaintiff failed to prove that the tea did not conform to the sample.*
d. *I found no loss or damage which the plaintiff suffered, which was attributable to the actions or omissions of the defendant. Therefore, the plaintiff is not entitled to any compensation from the defendant.*

136. In the final analysis, the plaintiff's claim has failed, because the same was not proved against the defendant. I therefore dismiss the suit in its totality.

137. I award to the defendant, the costs of the case.

DATED, SIGNED and **DELIVERED** at **NAIROBI** this **8th day** of **October** 2014.

FRED A. OCHIENG

JUDGE

Judgment read in open court in the presence of

K. Ochieng for the Plaintiff.

Kipn'geno for the Defendant.

Mr. C. Odhiambo, Court clerk.