



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MOMBASA**

**CIVIL CASE NO 463 OF 1987**

**ALI MOHAMED.....PLAINTIFF**

**VERSUS**

**ATTORNEY GENERAL.....DEFENDANT**

**JUDGMENT**

The plaintiff prays for judgment against the Attorney-General for:-

- (a) An order binding the defendant to release the coffee to the plaintiff.
- (b) An order of injunction restraining the defendant by himself, his servants, agents, employees and more particularly the Provincial Commissioner, Coast, the Provincial Administration and the police from preventing the plaintiff from collecting the coffee at Taveta Police Station or any other premises in which it is kept.
- (c) General damages

The background to the suit is that police prosecuted five people in Voi Criminal Case No 784/86 for the offence of smuggling 135 bags of coffee. On 27th March, 1987, the Resident Magistrate Voi acquitted the five accused and ordered the vehicle used in the alleged smuggling to be released to one of the accused. The learned magistrate ordered that the 135 bags of coffee be sold by public auction and by a separate order appointed Shirkely Auctionmart to be the auctioneer. There was no order of forfeiture or order as to how the proceeds of sale of the coffee would be disposed of.

The plaintiff avers that the auction was held on 15/4/87 and that he purchased the 135 bags of coffee at shs 21,300/- but the police refused to release the coffee to him. Apparently, the dispute about the coffee reached the Provincial Commissioner who in response to a letter by the plaintiff's advocate, wrote on 18/6/87, that when the Government's decision on the matter is made, the plaintiff's advocates would be informed.

Earlier, on 26/5/87, the Principal State Counsel had written to the Provincial Criminal Investigations Officer Coast (PCIO) advising him among other things that:-

“From a legal perspective, if there were no irregularities in the manner in which the auction was conducted then the property in the coffee should lawfully be passed to the complainant.....”.

The coffee was not released and on 2/5/87, the plaintiff filed this suit. In the suit, the plaintiff contends

that the refusal to release the coffee has been in flagrant and wanton abuse of lawful court order and is unlawful.

The plaintiff filed an application for interlocutory injunction contemporaneously with the plaint. The interlocutory injunction sought was in terms of prayer (b) of para 13 of the plaint. That application was rejected by court on 22/7/87.

The defendant subsequently filed a statement of defence. In para 2 of the defence, the defendant admits that the plaintiff did purchase the coffee through a successful bid at the auction.

In para 3 of the defence the defendant denies that the refusal to release the coffee is unlawful as the coffee is the property of Government of Tanzania.

The plaintiff reacted to that defence by filing an application to strike out the defence. The application was fixed for hearing by consent for 25/9/87 but the defendant did not appear. In the course of arguing the application, the learned counsel for the plaintiff disclosed that the coffee the subject matter of the suit had been released to the Government of the Republic of Tanzania and that the only redress that plaintiff can get is by recovery of damages.

The court acceded to the application and struck out the defendant's defence and entered judgment in favour of the plaintiff for general damages. The suit was thereafter set down for assessment of damages. The defendant was served but did not attend the hearing.

It is not within my province to say anything about the legality or otherwise of the order of the Resident Magistrate Voi that the 135 bags of coffee be sold by public auction or to comment as to whether the subsequent auction resulting from the learned magistrate's order, lawfully passed the property in coffee to the plaintiff. This is so because defendant concedes that the plaintiff purchased the coffee through a successful bid at the auction and did not seek to question the validity of the transaction.

Another reason why I do not have jurisdiction to comment on those matters is because the defendant has already been found liable to pay damages to the plaintiff. The suit is before me for assessment of general damages. In proof of the damages the plaintiff testified that he has been appointed by Gulleid Kenya Industries (1980) Ltd as their Coffee and Tea Commission Agent. The plaintiff produced the letter appointing him (Ex 1) and a photostat copy of the licence issued by Coffee Board of Kenya to his principal to deal in coffee.

His principal buys coffee from the coffee auctions held by the Coffee Board of Kenya. As agent of Gulleid Kenya Industries (1980) Ltd the plaintiff sells Gulleid's packed coffee and tea locally and is paid commission on sales.

Plaintiff further testified that he also buys coffee on his own and sells it to Gulleid Kenya Industries (1980) Ltd and as an agent he does not require a dealer's licence from Coffee Board of Kenya.

In respect of the 135 bags of coffee he purchased at the auction on 15/4/ 87, he testified that their weight was 8100 kgs and after the purchase he entered into a contract with Gulleid Kenya Industries (1980) Ltd on 30/4/ 87 for the sale of 135 bags of coffee at shs 50/- per Kg.

He produced an agreement dated 30/4/87 (Ex 2) and stated that he was therefore to get shs 405,000/- and that arising from the seizure of the coffee he lost Shs 405,000/- which he now claims.

Plaintiff further testified that he traveled from Mombasa to Taveta to get the coffee released by police and that he paid shs 12,848/35 for the car.

When I questioned the plaintiff about the sum of shs 12,848/35, he conceded that he paid shs 2,843/35 for the hire of the car but in the course of the journey, the car was involved in an accident and had to pay the balance for the cost of repairs.

The plaintiff further conceded that he was not sent by Gulleid Kenya Industries (1980) Ltd to buy coffee in the auction on their behalf. According to him, he found the auction by accident and decided to buy the coffee to re-sell to Gulleid Kenya Industries (1980) Ltd.

The claim as framed in the plaint is in detinue – that is for the release of the coffee though the plaintiff did not claim their value in lieu. The plaintiff in addition claimed general damages. But in course of the trial when the plaintiff realized that the Government has released the coffee to Government of Republic of Tanzania, he abandoned the claim for return of the coffee and sought judgment for damages and in fact obtained judgment for damages. So, at the time the judgment for general damages was entered on 12/10/87, the plaintiff was not asserting his property in the coffee and the judgment was not for return of goods but for damages.

Even in his evidence in proof of damages, the plaintiff did not claim for the return of the coffee. It therefore turned out that what the plaintiff is saying is that the police willfully refused to release the coffee to the plaintiff and wrongfully released the coffee to the Government of Tanzania. The plaintiff's suit thus changed its character from an action in detinue to an action in conversion. The type of evidence given in proof of damages is geared to a claim for conversion rather than in detinue – see *Saranj v AG*, [1970] EA 347.

In determining what damages the plaintiff is entitled, I will regard the plaintiff's claim as a claim in conversion rather than a claim in detinue. What is the measure of damages in this suit?

In awarding damages, the courts are guided by the fundamental principle of *restitutio in integrum*.

The normal measure of damages for conversion is the market value of the goods converted at time and place of conversion though the increase or decreases in value of the goods between the time of conversion and judgment may be considered in appropriate cases – see *Mayne & McGregor on Damages* 12th Ed Pages 592 and 593. The plaintiff claims shs 405,000/- as the loss he suffered by the conversion of the coffee and this figure is based on the value of the contract he entered into with Gulleid Industries (K) Ltd, on 30/4/87. As pleadings show, the plaintiff upon purchase of the coffee immediately went to Taveta Police Station to seek its release. Indeed, he sought to show that after the purchase of the coffee he hired a vehicle to travel to Taveta. By the time of resale on 30/4/87, the coffee had not been released to him as police had refused to release it. So, what was he selling to Gulleid Kenya Industries (1980) Ltd on 30/4/87?

Further, even if there was such agreement of sale, it is my view that the plaintiff would not have honoured the agreement without committing an offence under S 13(3) of the Coffee Act (cap 333). It is clear from the plaintiff's evidence that he was not buying the coffee as agent of Gulleid Industries (1980) Ltd but on his own behalf to sell and make a profit. He says that he did not require a coffee dealers licence to deal in coffee. I do not agree for S 13(1)(a) of the Coffee Act prohibits any person to buy, sell etc or otherwise deal in or transact any business in coffee unless he is the holder of a licence giving him authority issued by the Coffee Board of Kenya. This aspect is relevant in determining the market value of the 135 bags of coffee. The fact that the defendant did not participate in the assessment of damages and raise issue of the illegality of the re-sale agreement does not preclude me to consider it when assessing damages. In *Bowmakers Ltd v Barnet Instruments Ltd* [1945] 1 KB 65 the English Court of Appeal stated at page 70:-

“..... No court ought to enforce an illegal contract or allow itself to be made the instrument of re-enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the court and the person invoking the aid of the court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality the court ought not to assist him”.

The relevance of that passage to the issue under consideration is that the agreement of resale being tainted with illegality cannot be used as a measure of the damages that the plaintiff is entitled (if it is intended to show the market value of the 135 bags of coffee).

But if I understand the plaintiff correctly, he is not saying that the shs 405,000/- is the market value of the coffee but that because of conversion he lost a lucrative contract. Indeed it was, for the plaintiff if the deal went through, could have made profit of shs 373,700/-. However, the plaintiff's loss of profit on contracts made with third parties is not recoverable unless it was anticipated by the defendant – see *The Arpad* [1934] P 189. In the present case, it cannot be said that when the police refused to release the coffee, they anticipated that the plaintiff would lose a lucrative bargain as the resale agreement was not in existence at the time of conversion.

For reasons stated, I would hold that the resale agreement is valueless as evidence of value if it was intended to prove value and that if plaintiff is relying on it as proof of loss of profits, then that loss is not recoverable in the circumstances of this case.

The plaintiff did not give any other evidence to prove the market value of the coffee. May be he would have lawfully sold the coffee to the Coffee Board of Kenya but we do not know what price it would have fetched. The only evidence of value available is the price at which the plaintiff bought the coffee at the public auction - that is shs 21,300/-. Normally public auctions are best barometers of the market value of the commodity. The plaintiff has not contended that the price he paid at the public auction was not the fair market price of the coffee.

As regards the claim for shs 21,848/35, this is an item of special damages which must be specifically pleaded. There is no claim for special damages in the plaint. The plaintiff has in addition, conceded, that he hired the vehicle for shs 2,843/35 and the balance of the claim ie shs 10,000/- is the cost of repairs after the hired vehicle was involved in an accident. There is no link between the refusal to release the coffee and the accident and that claim is too remote.

In respect of the cost of hire, the Hire Agreement shows that the vehicle was hired from 14/4/87 to 16/4/87. The auction was on 15/4/87. The vehicle was therefore hired before the auction took place and it is inconceivable that the vehicle was hired for purposes of traveling to Taveta to demand release of the coffee. The whole claim of shs 12,843/35 is rejected.

For the above reasons, I assess the market value of the 135 bags of coffee at the time of conversion at shs 21,300/- and enter judgment for the plaintiff for shs 21,300/- with interest and costs at subordinate court scale.

Dated and Delivered at Mombasa this 2<sup>nd</sup> Day of March, 1989

**E.M. GITHINJI**

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**JUDGE**