REPUBLIC OF KENYA

COURT OF APPEAL AT NAIROBI

CIV APP 20 OF 1984

THE HONOURABLE THE ATTORNEY GENERAL ……. APPELLANTS

AND

ZAHERALI J SUNDERJI t./a "CRYSTAL ICE CREAM" ……..…. RESPONDENTS

(Appeal for the judgement of the High Court of Kenya at Mombasa(Bhandari,j) dated February3,1983

IN

Civil Case 722 of 1977

JUDGMENT OF NYARANGI, J A

This appeal is against the judgment of Bhandari, J given on February 3, 1983 in an action between Zaheraji Jamal Sundrej, (the plaintiff) and the Attorney – General and the Kenya National Trading Corporation Ltd (the K N T C) (the defendants). The K N T C has not appealed.

By his plait filed in the High Court Mombasa on November 2, 1977, the plaintiff stated that he was at all times the owner and entitled to the possession of 600 bags of sugar which was stored in godown premises situated in Mombasa. Para 5 of the plaint stated,

> "That on or about November 24, 1974, the Government of Kenya acting through the Ministry of Commerce and Industry took possession of the said 600 bags of sugar and subsequently had the same sold through defendant No 2 without the consent or knowledge of the plaintiff."

Para 6 is as follows:

> " That by a letter dated April 20, 1977, the plaintiff, through his advocates Messrs Sharma & Shah has duly demanded the return of the said sugar or value thereof from the defendant no 1 and the defendant no 2 but both the defendants have failed to return the said sugar or any part thereof or to pay the value thereof. The Government of Kenya at Defendant no 2 still continue to retain and / or to have converted to their use the said sugar."

Para 7 reads

> " The plaintiff states that neglect or refusal to return the said 600 bags of sugar to the plaintiff or to pay the value thereof to the plaintiff amounts to compulsory acquisition of the plaintiff's property without payment of compensation and the said compulsory acquisition thereof of the

said sugar is unlawful and unconstitutional."

Under para 8 the plaintiff claimed from the defendants jointly and severally either the return of the 600 bags of sugar or its market value.

In the alternative the plaintiff claimed from the defendants jointly and severally the proceeds of the sale of the said 600 bags being the money payable by the two defendants to the plaintiff from the money recovered by the defendants for the use of the plaintiff. The plaintiff prayed for judgment against the Attorney-General and the K N T C jointly and severally for a declaration that the 600 bags of sugar were his property, assessment of compensation to which the plaintiff was entitled, assessment of money had and received by the two defendants from the sale of the sugar and an order for prompt payment thereof to the plaintiff. The facts behind the action in the High Court were as follows: The respondent owned an ice-cream manufacturing business for which he normally wanted 100 bags of sugar per month in low season but twice as much during high season. On October 19, 1974 the respondent was authorised to purchase 100 bags and ten days later was given authority to buy an additional 100 bags. But before the additional authorised purchase that is October 25, 1974, the respondent purchased 500 bags of sugar from the agents of K N T C and stored it together with the 100 bags in the godowns of Bhaganis Warehouses Limited. Approximately one month after the purchase of the 500 bags (on November 22, 1974) the respondent informed the Ministry of Commerce and Industry of the purchase. Four days later the respondent was informed by Bhagani Warehouse Limited that the 600 bags of sugar stored with them had been seized by police officers.The respondent sought the assistance of the Ministry in respect of the 600 bags but was told on November 28, 1974 that he would not be issued with a permit to cover that quantity of sugar. Bhandari, J held that the respondent was not intending to hoard the sugar, not doing anything clandestine, the seizure of the sugar was lawful but that its disposal by sale was wrong and without lawful sanction and ordered the Attorney- General to pay the respondent Kshs 347,700.00 being the value of the 600 bags. The Attorney-General is aggrieved by the decision of the High Court and bases his appeal on the following grounds:

(1) The learned judge erred in not dismissing the respondent's (plaintiff's) case with costs against the appellant since the respondent on his own showing admitted that he acquired possession of the sugar in question unlawfully and that he knew he was committing an offence when he purchased the said sugar unlawfully and without a permit.

(2) The learned judge erred in not holding that the acquisition of the sugar by the respondent being illegal and /or tainted with illegality the respondent was not entitled to come to a court of law and seek redress therefrom.

(3) The learned judge misdirected himself in not holding that the case of the respondent was founded on a cause of action on an unlawful or illegal act and in not further holding that on the respondent's own stating his cause of action arose ex turpi causa or the transgression of a positive law of this country and that therefore the court ought to have held that he had no right to be assisted.

(4) The learned judge erred in holding that the respondent's claim to the sugar or its proceeds did not arise out of a transaction which was illegal and further erred in holding that the respondent was simply in the position of a man suing for goods belonging to him which were being detained by a person who had no right to them and he was entitled to recover and that that was the position in the instant suit.

(5) The learned judge erred in holding that the respondent's claim cannot be defeated because he bought some of the sugar without first obtaining a permit to do so and in not appreciating sufficiently or at all that the respondent was fully aware on his own showing that he was committing an offence by purchasing the sugar in contravention of the express provisions of the law.

(6) The learned judge erred in relying upon the decision of Kneller, J which itself was

erroneous but unfortunately no appeal had been preferred against it because of lack of instructions consequent upon certain changes in the personnel of the relevant Ministry of the Government of Kenya. The learned judge further erred in not distinguishing the facts and the law in Gordono v Metropolian Police Commissioner from the facts and the law to be applied in the instant suit.

(7) The learned judge was in error in concluding that merely because there was no court order for forfeiture of the sugar in question the possession thereof by the respondent was necessarily lawful and in not holding that it was unlawful.

(8) The learned judge erred in law in not holding that the respondent's suit was barred by Section 3(1) of the Public Authorities Limitation Act, (cap 39) and he further erred in holding that the finding by the late Sir Sheriden in the case of Jacob Luke Thuo vs Attorney General H C C C 361 of 1976 was merely obiter. The learned judge erred in not following the decision of the Court of Appeal for East Africa in C D Cullen v Parsuram and Hansraj, [1962] E A 159.

Mr Gautama for the appellant argued that the respondent had admitted committing an offence and courts will not help one who has infringed the law. It did not matter that the respondent was not prosecuted. What is relevant is that he bought the sugar contrary to express prohibition. Counsel submitted that the tortious act committed by the appellant could not be converted into a contract, that there is no way the plaintiff can escape pleading a tort, there being no contract of bailment here. That after one month the appellant's retention of sugar was unlawful and so time began to run from December 24, 1974. The court was referred to section 3(1) of the Public Authorities Limitation Act (cap 39).

In reply Mr Shah for the respondent first dealt with the submission on behalf of the appellant on the issue of illegality and urged that the ownership of the sugar passed to the respondent notwithstanding that he purchased the sugar without a permit, and so contravened the Imports, Exports and Essential Supplies Act, (cap 502) (the Act). Next, Mr. Shah argued that the respondent's claim is not defeated by the fact he acquired the sugar under an illegal transaction. The respondent does not have to rely on that transaction to assert his claim but on his ownership of the sugar. Mr Shah asked what right the appellant had to retain the sugar and said that if Mr Gautama's contention is right then the Governmetn would confisticate any goods obtained in an unlawful transaction without redress from courts. On the issue of limitation Mr Shah stated that the respondent by his plaint did not plead that the seizure was unlawful but that what was pleaded was not the refusal and neglect to return the sugar was unlawful. Counsel argued that having initially lawfully taken possession of the sugar, the Director of Trade and Supplies became a bailee, applied for an order from a magistrate and after one month, the Director was obliged to deliver it to the respondent. Mr Shah was unable to cite any authority that where the Government takes sugar lawfully, it is under an obligation to return it and it holds the sugar in bailment. Mr Shah said that even if the respondent did not demand, there could be no better custodian and that since the cause of action arose at the time of the appellant's failure to meet the respondent's demand made on April 20, 1977, the respondent's action is in detinue and therefore is not defeated by section 3(2) of The Public Authorities Limitation Act. If however the respondent failed because of limitation, his claim is for money had and received and time would begin to run from June 26, 1975. Mr Shah thought that the Government had unjustly enriched itself at the expense of the respondent and that on quasi-contract for restitution, the cause of action arises when the defendant unjustly enriches itself by receiving money to which it is not entitled.

It is of the utmost importance to appreciate the provisions and the purpose of the Act. One of the three matters provided for in the Act is the control of supplies which are essential to the life or well-being of the community.

The seizure of the 600 bags of sugar was lawful. The respondent obtained the sugar contrary to the direction of the Director of Trade and Supplies given under sub-section 1 (d) of section 10 of the Act and so the Director was entitled to invoke section 15 of the Act and seize the sugar. The Director, having lawfully seized the sugar, was required under section 17 to report forthwith to a magistrate the fact of

seizure. Only the magistrate could authorise the Director to sell or otherwise dispose of the sugar. On the evidence, no authority was given to the Director as provided under section 17.

Section 18 provides,

> "18(1) where any goods have been seized under section 14,15 or 16, the goods may be retained for a period not exceeding one month or, if within that period proceedings are commenced for any offence under this Act in respect of such goods, until the final determination of those proceedings.
>
> (2) Where proceedings are taken for any offence under this act, the court by or before which the alleged offender is tried may make such order as to the forfeiture of the goods in respect of which such offence was committed or as to the disposal of such goods as the court shall see fit.
>
> (3) In this section, references to "goods" shall be construed as including the proceeds of the sale of any goods, where such goods have been sold in accordance with section 17."

The Director could lawfully retain the sugar for a period not exceeding one month. There is no provision under section 18 about what to do with the goods seized if no court proceedings are commenced or if a magistrate declines to authorise the Director to sell or otherwise dispose of the goods. Inter alia section 17 is intended to safeguard the rights of the owner of the goods seized. Where therefore a magistrate ponders over the fact of seizure as reported and declines to authorise the Director to sell or dispose of such goods, the irresistable inference is that the Director could not retain the goods one month after the seizure. The report to the magistrate has to be made forthwith and because of section 18, not later than one month. It follows then that the Director sold or disposed of the sugar in contravention of the Act. Any wrongful acts after December 24, 1974 with regard to the sugar were tortious acts and well within para 5 and 7 of the plaintiff's plaint. The period of limitation began to run from December 24, 1974 and, pursuant to section 3(2) of the Public Authorities Limitation Act, the time expired 12 months later. By November 2, 1977, the plaintiff's action was statute-barred.

In my judgment, the Government did not become a bailee at any time of the transaction. At no time was the sugar – seized goods handed to the Government under a contract. There was no contract between the parties for the Government to lawfully take possession of the sugar and so to urge as Mr Shah did that the Government became a bailee and reported to the magistrate was without any foundation and the many authorities cited in support missed the point. As there was no agreement between the parties, no form of bailment ever existed. Under section 15, the Director has powers, of entry and seizure of a drastic, draconian nature which exclude agreement or negotiation.

The gist of detinue, a form of action which lies for recovery of personal chattels from one who has acquired possession of them lawfully but retains it without right, is the wrongful detainer and not the original taking. The plaintiff proves property in himself and possession in the defendant in detinue sur trover In the circumstances, the appellant could not defend himself by saying that he no longer has possession of the sugar: Charles Douglas Gullen v Parsram and Hansraj [1962] E A 159 at page 164 per Newbold, J A That is not to say that in this particular case the appellant could not hold the respondent to his pleadings and pray in aid limitation which issue in my respective judgment arises from the two statutes, that is, The Imports, Exports and Essential Supplies Act (cap 502) and The Public Authorities Limitation Act (cap 39) which statutes are central to the case. I cannot think it right for a common law doctrine to be relied upon to circumvent a statutory provision. In any case, the respondent has benefited enormously by not being prosecuted so that failure to get an order for forfeiture would not in my view be a basis for reasonable complaint. I would allow the appeal and order that the judgment entered in the High Court in favour of the respondent against the appellant be set aside with costs and further that the appellant ought not to bear the costs of the respondent against the second defendant the K N T C in the High Court, and that the respondent's suit both here and below is dismissed with costs.

As Gachuhi, J A reached the same conclusion it is so ordered.

Delivered at Nairobi this October 29, 1986

J O Nyarangi

Judge of Appeal