



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, OKWENGU & KANTAI, JJ.A.)

CIVIL APPEAL NO.226 OF 2005

BETWEEN

SATWANT SINGH DHANJAL

ASHWINDER SINGH DHANJAL

AND HARJOT SINGH DHANJAL

T/A PARAMOUNT HAULIERSAPPELLANTS

AND

KENYA REVENUE AUTHORITY.....RESPONDENT

(Being an appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Anyara Emukule, J.), dated 15th July, 2005

in

H.C.C.C. No.1610 of 2001)

JUDGMENT OF THE COURT

Introduction

[1] This is an appeal from the Judgment of the High Court (**Anyara Emukule, J.**) delivered on 15th July 2005. The proceedings in the High Court were initiated through a plaint dated 17th October 2001 by Satwant Singh Dhanjal, Ashwinder Singh Dhanjal, and Harjot Singh Dhanjal T/A Paramount Hauliers who are now the appellants, in which the appellants sought damages against Kenya Revenue Authority (now respondent).

Background

[2] The events leading to the suit started on 2nd March 2001 when the respondent through its Customs and Excise Department published a notice in the Kenya Gazette advertising various goods for sale through public auction. Amongst the goods advertised were a 40ft container that had 10 pieces of Ro-Ro machines

and a 20ft container that had 28 pieces of Ro-Ro machines. The appellants through their agent Mr. Bipin Rathod attended the auction and successfully bid for these two containers at Kshs.7,120,000/=. The appellants duly paid the requisite 25% deposit amounting to Kshs.1,800,800/=. On 26th April 2001 the appellants paid the balance of Kshs.5,320,000/=.

[3] On the 27th April 2001 when the appellants' agent went to collect the goods from the respondent, he learnt that the High Court sitting at Kisumu had issued an order barring the respondent from selling disposing and/or alienating the said containers pending the hearing of a judicial review application lodged by Caneland Limited who sought prohibitory orders against the respondent claiming ownership of the goods. The judicial review proceedings were finally determined in favour of Caneland Limited and the respondent ordered to release the two containers to Caneland Limited. The aggrieved appellants blamed the respondent for this turn of events and therefore filed the suit claiming *inter-alia*:-

a) Special damages in the sum of Kshs. 32, 880,000/-,

b) General damages for breach of contract,

c) Punitive and exemplary damages.

[4] The respondent filed a defence to the appellants' claim in which it maintained that they released the goods to Caneland Limited in compliance with the court order. During the hearing of the suit in the High Court, the appellants' testified through one of its partners Satwant Singh Dhanjal. The witness claimed that the goods for which the appellants had bid comprised of 5 sugarcane-loading machines that they intended to sell and would have made Kshs.40 million. He relied on an invoice issued by Caneland Limited showing one such machine was sold to Busia Outgrowers for Kshs 8 million. Consequently the appellants amended their special damages claim from 32,880,000 to Kshs.40 million.

[5] On its part the respondent testified through its employee one Peter Mutua Makuri who was at the material time working at the Customs Warehouse. He testified that although according to the Ship Manifest Caneland Limited imported 5 cane harvesting machines, 3 of the machines were not containerized, and that only two of the machines that were in complete knocked down state were packed in the two containers that were advertised for sale. This was after a notice had been given to the consignee to collect the goods within 21 days. He conceded that the goods were sold at a public auction but explained that they could not be released to the successful bidder due to a court order that directed release of the goods to the consignee. The witness maintained that the appellants were only entitled to refund of the bid price that they had paid.

[6] In his judgment the learned Judge rejected the appellants' prayers for special and general damages for breach of contract, and punitive damages, and held that the appellants were only entitled to refund of the amount that they had paid. The learned judge therefore ordered the respondent to pay the appellants the sum of Kshs.7,120,000/= together with interest and costs of the suit.

[7] The appellant is dissatisfied with this judgment and has lodged the present appeal against the judgment raising seventeen grounds of appeal. At the request of the parties' advocates this Court gave directions for the appeal to be disposed of by way of written submissions. Accordingly, the parties have duly exchanged and filed written submissions, the appellant being represented by Harit Sheth Advocates and the respondent by PM Mutuku advocate.

Submissions of the Appellants

[8] In their written submissions the appellants argued grounds 1 and 2 of the memorandum of appeal together. The two grounds are contesting the finding of the learned Judge that the respondent made no warranties or representations to the appellants regarding their authority to sell the goods as the sale was made pursuant to statutory requirements. The appellants argued that the respondent's authority to sell the goods by public auction depended on strict adherence to the provisions of Section 34 of the Customs and Excise Act (C&E Act), which condition the respondent failed to comply with.

[9] The appellants submitted that in the Kisumu Case, the court found that the Gazette Notice issued by the respondent was invalid because the Notice of Abandonment gave the consignee less than the statutory 21 days, and that the notice did not indicate the name of the consignee of the goods. The appellants maintained that the respondent did not invoke Section 34 of the C&E Act properly and thus its authority to sell the goods had not accrued. The appellants further postulated that by conducting the auction as it did the respondent misled the buying public that its authority to sell the goods had accrued and was exercisable. The appellants argued that they relied on this misrepresentation in bidding for the goods, and that the successful challenge of the auction by the consignee of the goods was evidence that the respondent was in breach of the representations and warranties it had made to the public about its ability to sell the goods.

[10] In regard to grounds 3, 7 and 11 that are on the issue of damages, the appellants posited that the learned judge contradicted himself in his findings, on one hand holding that following the annulment of the auction by the court in the Kisumu Case the appellants' remedy lay in damages, and on the other hand holding that the appellants' remedy lie in appealing the order annulling the auction.

Further, that while relying on Section 206 (3) (b) of the C&E Act, the learned Judge held that the provision empowered the court to order the commissioner to pay both damages and costs and used this provision to award costs against the respondent, and yet declined to award damages in favour of the appellants contending that under the provisions of the C&E Act there were no grounds to accede to the prayers for damages.

[11] In grounds 5, 6 and 12 the appellants further reiterated the issue of damages, submitting that Section 212(3) of the C&E Act comes into play when an action is brought against an officer of the Customs and Excise Department in his individual capacity for an act done in the course of his duties in which case no damages or costs are recoverable. The appellants argued that this is in contradistinction to Section 206(3) of the C&E Act under which the action is brought against the Commissioner in his representative capacity. In the latter situation damages and costs are awardable against the Commissioner and this was the position in the appellants' case. Thus the appellants faulted the judge for relying on section 212(3) of the C&E Act and denying the appellants damages notwithstanding this clear distinction.

[12] The appellants also submitted on ground 4 challenging the leaned Judge's understanding of special damages. Relying on *Ratcliffe vs Evans (1892) 2QB 524 at page 528*; and *Siree vs Lake Turkana El Molo Lodges Limited (2002) 2 EA 521*; the appellants argued that the finding of the learned judge that the special damages could not be awarded because the appellants had not proved that it expended the amounts claimed as special damages was too narrow; that the term special damage denotes more than an amount that a claimant has actually expended; and that it can include even future profits as long as the loss is quantified, pleaded and proved. The appellants maintained that they had pleaded and claimed special damages for loss of bargain, and that they demonstrated that the market value of the items was Kshs.8,000,000/= per piece.

[13] In Grounds 8, 9 and 10 the appellants challenged the finding of the learned Judge that the Sale of Goods Act was not applicable in the circumstances of this case and argued that once a contract of sale of goods had been entered into, the substantive law governing such a contract was the Sale of Goods Act. The appellant further argued that indeed the Sale of Goods Act at Section 23 recognizes sales such as the one herein where the seller is not the owner of the goods but sells pursuant to statute.

[14] On grounds 13, 14, 15 and 17 which addressed the relief that the appellants were entitled to and quantification thereto, the appellants relied on the case of *Radacanachi vs Milburn (1886) 18 QBD 67*, and argued that having demonstrated that there was a market for the goods, the damages payable for the breach of contract should be equal to the market price of the five items sold.

[15] The final ground argued by the appellants was ground 16 under which the appellants contended that the parties having framed 22 agreed issues in the statement of agreed issues, notwithstanding the court's finding on the issues framed by the court for determination, under Order 21 of the Civil Procedure Rules the learned Judge was duty bound to make reasoned findings on each of the issues identified by the

parties as agreed issues. The appellants faulted the learned Judge for failing to discharge this obligation.

Submissions of the Respondent

[16] In its written submissions the respondent urged the Court to dismiss the appeal maintaining that it had no merit. The respondent argued that grounds 1 and 2 advanced by the appellants had no substance, as the learned Judge rightly held that the power to sell the goods had arisen under Section 34 of the C&E Act; that the appellants had in any event not pleaded that the power to sell the goods had not arisen; and that it was prohibited from delivering up the goods to the appellants by a court order made by a competent court in proceedings in which the appellants' agent, Bhavin Motors Ltd, had participated. The respondent asserted that the right of sale arose by operation of law, and that the consequences of a default under such a sale can only be determined in accordance with the express provisions of the Customs and Excise Act, which is the law applicable to that sale.

[17] On grounds 3, 7 and 11, the respondent submitted that the appellants were merely speculating, as they had not ventured into the trade of selling cane-harvesting machines. They argued that the appellants could not prove their alleged special damages claim by relying on receipts and invoices from Caneland Ltd, nor could they anchor their claim on the profits which were made by Caneland Ltd who were established in the trade of selling cane harvesting equipment. Further, the respondent faulted the appellants' pleadings in regard to the general damages as damages were sought for breach of contract, which was not obtainable under the statutory regime under which the auction was conducted. The respondent argued that even if the issue of breach of contract was to be applied, the alleged loss of profit and bargain were too remote to be claimed under those heads taking into account that both in contract and tort damages are compensatory for losses incurred. In support of this submission the respondent relied on the case of *Hadley vs Baxendale (1854) 9 Exch. 341* and argued that for loss to be recoverable, the damages should fairly and reasonably be considered either arising naturally or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract. The respondent contended that the loss of bargain and profits by the appellants were not anticipated as the natural and probable consequence of breach of sale agreement pursuant to a sale by statutory auction.

[18] On grounds 5, 6 and 12, the respondent submitted that they were in agreement with the learned Judge on his findings on the issue of damages, they contended that the appellants were not entitled to damages but restitution of the value of the goods in accordance with Section 212(3) of the C&E Act; and that in this case restitution was in terms of the price the appellants had paid for the goods, which was Kshs.7,120,000/=.

[19] On ground 4 which dealt with the issue of special damages, the respondent relying on the case of *Hahn vs. Singh Civil Appeal No. 42 of 1983 [1985] KLR*, argued that the appellants did not prove what they had lost; that the appellants claim was for anticipated special damages which could only be proved by showing that the appellants had a ready market for the goods but were unable to satisfy that market by acts of the respondent, and not merely by riding on the profits that the initial consignee of the goods made.

[20] On Grounds 8, 9 and 10, the respondent submitted that the assertion by the appellants that once a contract of sale has been entered into, the substantive law governing such a contract is the Sale of Goods Act cannot hold because the sale subject of the appellants' suit was conducted under the C&E Act, and any consequences of default under such sale can only be determined in accordance with the express provisions of the C&E Act and not the Sale of Goods Act. Further, that under Section 23 of the Sale of Goods Act, the sale to the appellants was exempted from the provisions of the Sale of Goods Act as it was conducted pursuant to a statutory power of sale under a different statute and stopped by a court of competent jurisdiction.

[21] On grounds 13, 14, 15 and 17 the respondent submitted that the issue of reliefs that the appellants would have been entitled to and the quantification of the same does not arise as the appellants had the option of either applying to set aside the order in the Kisumu case or appealing against that order and that having failed to exercise those options the issue of the measure of damages does not arise. Finally, the

respondent dismissed ground 16 contending that the learned Judge addressed all the issues raised before him in a cluster, which was similar to the method adopted by the appellant in arguing his grounds of appeal in 7 clusters.

Issues for Determination

[22] We have considered this appeal and carefully perused the record, the respective written submissions made by learned counsel on behalf of the parties and the authorities cited. We find it common ground that the appellants successfully bid through an agent and paid for two containers that were being sold by the respondent pursuant to its powers under the C&E Act, but that the sale aborted after the High Court sitting in Kisumu issued orders for release of the goods to the original consignee. In our view, the following issues arise for determination in this appeal:

- a) Whether there was a warranty/representations made regarding the respondent's authority to sell the goods, and if so whether there was breach of such warranty/representation, and whether the learned Judge was wrong to deny the appellants general damages for breach of contract.
- b) Following the release of the goods to the original consignee, what remedy or relief were the appellants entitled to, and did the learned judge err in his interpretation and application of sections 206(3) and 212(3) of the C&E Act, and declining to award the appellants damages.
- c) Whether the transaction between the appellants and the respondent was governed by the Sale of Goods Act or exempt from the Sale of Goods Act, and what was the implication in regard to the appellants' claim.
- d) Whether appellants were entitled to refund of the market price of the goods that they had bid for and whether the appellants were entitled to special damages for loss of bargain and profits as pleaded.
- e) Whether the learned Judge erred in refusing to award the appellants special damages.

[23] In dealing with these issues, we will also address other issues raised in the grounds of appeal as set out in the memorandum of appeal and addressed by the appellants and the respondent. We start by reiterating this Court's mandate on a first appeal as restated in **Kenya Ports Authority versus Kuston (Kenya) Limited (2009) 2EA 212** that:-

“On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence”

[24] Where the exercise of judicial discretion is the subject of interrogation, the Court remains guided by the principles enunciated in **Selle v Associated Motor Boat Company Ltd [1968] EA 123** and reiterated in **Pil Kenya Ltd vs. Oppong [2009] KLR 442**; that it will not interfere unless it is satisfied that the judge misdirected himself in some matter and as a result arrived at a wrong decision, or that it be manifest from the case as a whole that the judge was clearly wrong in the exercise of discretion and occasioned injustice by such wrong exercise.

Analysis and Determination

[25] In their plaint, the appellants sought general damages for breach of contract. The contract of sale between the appellants and the respondent arose from a public auction sale pursuant to section 34 of the C&E Act. This section states as follows:

“34. Goods deposited in a customs warehouse may be sold, etc.

(1) Where goods, which are deposited in a customs warehouse, are not removed within twenty-one days after deposit, then, the proper officer shall give notice that unless such goods are removed within twenty-one days from the date of the notice, they shall be deemed to have been abandoned to customs for sale by public auction.

(2) Subject to subsections (3A) and (4), where goods are deemed to be abandoned under subsection (1), then, such goods, whether restricted or not, shall be sold by public auction after twenty-one days notice of sale has been given.”

[26] It is evident that the respondent’s power to sell the goods was subject to the owner of the goods being given notice and an opportunity to remove the goods within the 21 days. Thus, the publication of an advertisement of an intended auction sale was a clear representation and assurance that the respondent’s right to sell the goods at the public auction had crystallized. In his judgment, the learned judge drawing a parallel from the exercise of a statutory power of sale under the Transfer of Property Act of India stated as follows:

“In those instances, it is said that the statutory power of sale had arisen. By this is meant that the mortgage Bank had fulfilled all the legal and contractual requirements vested in him to be able to sell.

So for instance, under the provisions of Section 69B of the Transfer of Property Act 1882 of India (Group 8 Acts) a purchaser at an auction, is not either before or on transfer concerned to see or inquire whether a case has arisen to authorize the sale, or due notice has been given or the power is otherwise properly or regularly exercised, but any person damnified by an unauthorized, or improper, or irregular exercise of the powers shall have his remedy in damages against the persons exercising the power.

There is no plea here that the power to sell the goods had not arisen. The evidence of the Defendant’s Peter Mutua Makuli (DW1) was clear. He was a Senior Revenue Officer when the events giving rise to this case arose. His duty was to record and arrange for advertisement and sale of goods which the owners (importers), or their Clearing Agents failed to enter into the country in terms of section 27 of the Customs and Excise Act (Cap 472, Laws of Kenya). There was no challenge that the goods were not properly advertised and sold by public auction in terms of section 34 of the said Act. There was therefore no question of warranty or representation as in contract that the Defendant had and did have authority to sell the goods in question. This was a case of clear observance of statutory requirements on the part of the Defendant.”

[27] We concur with the learned Judge that the issue of warranty or representation did not arise because the respondent was exercising a statutory power of sale. Moreover, the question whether the respondent’s statutory power of sale had crystallized was not one for determination by the learned Judge because there was a presumption that the respondent’s statutory power of sale had arisen. If, as happened in this case, the exercise of the statutory powers was proved to be irregular then the appellants’ recourse lay in damages.

[28] In rejecting the appellants’ claim for damages the learned judge seemed to have relied on the provisions of Section 212 (3) of the C&E Act as opposed to section 206(3) of the C&E Act. As the interpretation and application of these provisions was contentious, we reproduce herein both provisions as follows:

“206. Actions by or against the Commissioner

(1) Where under this Act proceedings may be brought by or against the Commissioner, then the Commissioner may sue or be sued in the name of the Commissioner of Customs and Excise and may for all purposes be described by that name; and, notwithstanding that an action may lie in tort, the Commissioner shall be responsible for the acts and defaults of an officer as if the officer were his servant or agent:

.....

(2) Where under this Act proceedings are brought by or against the Commissioner in his representative capacity, costs may be awarded to or against the Commissioner.

(3) Where under this Act proceedings are brought by or against the Commissioner in his representative capacity and—

(a) any sums or costs are recovered by the Commissioner, then those sums or costs shall be credited to the customs and excise revenue:

(b) any damages or costs are ordered to be paid by the Commissioner, then those damages or costs shall be paid out of the monies appropriated for the administration of the customs and the Commissioner shall not be personally liable therefore.”

“212. Reasonable grounds a defence in any action against officer

(1) Where any proceedings, whether by way of prosecution or otherwise, are taken under this Act, and—

(a) the proceedings result in a determination in favour of a person prosecuted, or in favour of an owner claiming anything which has been seized;(the KISUMU case) and

(b) the proceedings arise out of an act done, whether by way of seizure or otherwise by an officer in the execution or intended execution of his duty under this Act; (respondent’s action seizing goods and purporting to auction) and

(c) the court before which the proceedings are determined finds that there were reasonable grounds for the act, then the court shall, on request made by or on behalf of the officer, so certify on the record; and a certified copy of that finding shall, on the request of the officer, be delivered to him and shall be receivable in evidence in any proceedings in proof of that finding. (no such certification produced before Emukule J)

(2) No officer shall be liable to any action or other proceedings on account of an act in respect of which a court has, under subsection (1), found that there were reasonable grounds for the act.

(3) Where proceedings are brought against an officer on account of an act done, whether by way of seizure or otherwise in the execution or intended execution of his duty under this Act and judgment is given against the officer, then, notwithstanding that in proceedings referred to in subsection (1), a court has not found that there were reasonable grounds for the act, if the court before which the proceedings are heard is satisfied that there were reasonable grounds for the act, the plaintiff shall be entitled to recover anything seized, or the value thereof, but shall not otherwise be entitled to damages and no costs shall be awarded to either party. (Emphasis added) (In other words the restriction on award of damages only comes in where the court is satisfied that there were reasonable grounds for the seizure and sale of the goods.)

[29] It is clear to us that section 206 of the C&E Act, only applies to suits that are brought either by or against the Commissioner in a representative capacity, for acts done by officers of the respondent. Secondly, the use of the word “may” in the provision makes it apparent that the power to award damages or costs in favour of or against the Commissioner is discretionary. This means that the award of damages is neither mandatory nor automatic but is dependent on the discretion of the court taking into account the circumstances of the particular case.

[30] Section 212 of the C&E Act is headed “Reasonable grounds a defence to any action against an officer.” A reading of this section shows that the provision of a defence to any action where the following

threshold is met restricts liability of an officer of the respondent:

- (i) the officer is sued in a personal capacity for an act done during the course of his duties; and
- (ii) the act has been subject of proceedings that result in favour of the owner of the goods; and
- (iii) either the court making an order in favour of the owner of the goods has made a a specific finding and certification that there were reasonable grounds for the officer’s action, or the court hearing the subsequent claim against the officer has made a finding that there were reasonable grounds for the officers action.

[31] In such a situation, the liability of the officer is restricted in that the officer cannot be held liable if there is certification that his action was reasonable, but notwithstanding that restriction the provision gives a right to the owner to recover the value of his goods only. That is to say that, the owner cannot recover any damages or costs. Worthy of note is that section 212 does not say anything about a situation where there is a finding that there were no reasonable grounds for the officer’s action. In our understanding, this means that such a position is not covered by the restriction in section 212, and an award of damages or costs can be made.

[32] In this case, the High Court was not dealing with a suit filed against the officer whose act was subject of the loss, but was dealing with a suit filed against the respondent in its name as a statutory corporation under section 3 of the Kenya Revenue Authority Act (Cap 469). In this regard, the learned Judge pronounced himself as follows:

“By Section 23 of the Kenya Revenue Authority Act, all references to the Commissioner of Customs and Excise Act under the Customs and Excise Act or any other written law, would be construed as references to the Commissioner General of the Authority, for the purposes, in my view, of the administration that Act, or those other written laws, but for the purpose of legal proceedings be referred to as the “Authority” in conformity with the provisions of Section 22(3) referred to above.

If the suit had been brought under the Customs and Excise Act, it would have been brought against the Commissioner of Customs and Excise pursuant to the provisions of Section 206 of the Customs and Excise Act, and in his representative capacity, and in which event it would be legal or lawful to award damages and costs against the Commissioner as aforesaid and these would be paid out of the revenue of customs and excise and not the Commissioner personally.

If however a suit were brought against an officer of the Customs and Excise Department, no damages and costs would be awarded against the officer and the only remedy of a successful Plaintiff would be restitution of the items seized or the value thereof and no costs would be awarded to other party (that is to say, every party would bear its own costs).

.....

I have also made reference to the provisions of section 206(3)(b) which provide that where the Commissioner of Customs and Excise is sued in his representative capacity, both damages and costs may be ordered against the Commissioner aforesaid. Since the enactment of the Kenya Revenue Authority Act, 1995 (No 2 of the 1995) references to the Commissioner aforesaid is deemed to be references to the Authority.

The suit herein is against the Authority, which by Section 22(3) took or stood in, the place of the Commissioner of Customs and Excise and the Court has power under the said Section 206(3)(b) to order both damages and costs against the Commissioner of Customs and Excise, now the Kenya Revenue Authority.”

[33] With due respect, we do not agree with the submission that the learned Judge contradicted himself

when he refused to award the appellants damages after stating that following the annulment of the auction the appellants remedy lay in damages. The general position remained that the appellants had a right of action in damages but this general position is modified by section 212(3) to the extent that if the appellants chose to sue the officer whose act resulted in their loss then they could only recover the value of what was seized and neither damages nor costs could be awarded to them. We can put this distinction no better than the learned Judge did as reflected in the above quote (see paragraph 31 herein).

[34] The learned judge in his judgment stated that there was a contradiction between the above Section 212 and Section 206 (3) of the C&E Act, in regard to the distinction between an action against the Commissioner of Customs and Excise acting in his representative capacity under Section 206 (3) and an action against an officer of the Customs and Excise Department in his personal capacity under Section 212. On our part, we do not perceive any contradiction between these two provisions. First Section 212(3) provides for actions against an officer in his personal capacity whereas Section 206 provides for right of action against the Commissioner of Customs & Excise in his representative capacity. Therefore, if the appellants had opted to bring the suit against the specific officer of the respondent who conducted the auction, then Section 212(3) of the C&E Act would have covered such an action. However, if the action is brought against the Commissioner in his representative capacity, then Section 206 of the Act covers it. In light of the Kenya Revenue Authority Act (No2 of 1995) the Commissioner is deemed to be the Commissioner General of the respondent who would be acting on behalf of the Kenya Revenue Authority. We concur with the learned Judge that although the suit was brought against the respondent directly, by virtue of section 22(3) of the Kenya Revenue Authority Act, the proceedings continued as if the Act was not in place and this means that section 206 of the C&E Act was still applicable and damages could be awarded against the respondent.

[35] The learned Judge gave the following reasons as to why the appellants' claim for damages failed:

“The right of sale (not the contract of sale), arises by operation of a particular law and the consequences of default under such sale, can only be determined in accordance with the express provisions of the law applicable to that sale. In this instance the applicable law is the Customs and Excise Act whose relevant provisions I have already referred to.

Applying the provisions of that Act, I can find no grounds for acceding to any of the prayers for general, punitive and exemplary damages as sought by the Plaintiffs. What happened in this matter was common knowledge to all parties in this suit, and in this case to the Plaintiffs in particular. The Defendant was stopped from delivering up the goods to the Plaintiffs agents, Bhavin Motors Ltd by a stay order issued by a court of competent jurisdiction. The only known remedy to challenge such an order is either to apply to the court which issued it to review and set it aside the order or to appeal to a higher court to set it aside. The interested party namely the said Bhavin Motors Ltd (which was a party to the proceedings under which the stay order was issued) or their Mr. Bipin Rathod (who was the Kingpin in the auction) did not consider it worthwhile either to apply to set aside or appeal against the order. The order therefore remained valid, binding and enforceable at all times against the Defendant. The Defendant would have acted in contempt of that court order if it acted contrary to the said order and delivered the goods either to the Plaintiffs or their agents. I therefore decline to make any order in the nature of general, punitive or exemplary damages against the Defendant.”

[36] It is evident that the appellants' claim failed not because damages could not be awarded against the respondent, but because the circumstances did not justify award of damages as sought by the appellants. We find that the sale to the appellants was frustrated by virtue of a court order, which order the appellants chose not to challenge. We cannot therefore fault the learned Judge for finding that there was no breach of contract to justify award of damages, nor do we find any contradiction in the application of section 206(3) of the C&E Act and the award of costs to the appellants.

[37] Further, we are in agreement with the learned judge that there was no contract of sale between the parties, but rather only a right of sale that arose by operation of law. The substantive law applicable was the C&E Act pursuant to which the auction sale was conducted. As evident from Section 23 (2) of the

Sale of Goods Act, the sale between the appellants and the respondent having been done under a statutory power of sale, it was exempted from the application of the Sale of Goods Act Act. Section 23 of the Sale of Goods Act provides as follows:-

“Sale by person not the owner

(1) Subject to the provisions of this Act, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller’s authority to sell.

(2) Nothing in this Act shall affect—

(a) the provisions of any enactment enabling the apparent owner of goods to dispose of them as if he were the true owner thereof;

(b) the validity of any contract of sale under any special common law or statutory power of sale or under the order of a court of competent jurisdiction” (emphasis added).

[38] As regards the appellants’ claim for special damages, the same is rendered moot, as there was no proof of breach of contract upon which it could be anchored. But even assuming that breach of contract was established it is trite that special damages must be specifically pleaded and strictly proved. This Court made this clear in Bangue Indosuez vs DJ Lowe and company Ltd [2006] 2KLR 208; where this Court stated as follows:

“Though special damages were specifically pleaded or claimed they were not proved at all. It is simply not enough for the respondent to pluck figures from the air and throw them in the face of the court and expect them to be awarded. It is trite that special damages must not only be claimed specially but proved strictly for they are not the direct natural or probable consequences of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and the nature of the acts themselves. This has been adumbrated by BOWEN LJ IN RATCLIFFEE V. EVANS (1892), 2 QB 524, 532, 533, Lord Macnaghten in STORMS BRUKS AKTIC BOLAG V. JOHN & PETER HUTCHINSON, [1905] AC 515, 525, 526 Lutta JA in KAMPALA CITY COUNCIL V. NAKAYE, [1972] EA 446, 447 and Chesoni, J in OUMA V. NAIROBI CITY COUNCIL [1976] KLR 294, 304 and in SANDE CHARLES C. V. KENYA CO-OPERATIVE CREAMERIES LTD. Civil Appeal No. 125 of 1996 (unreported). With respect, therefore, we think that the learned Judge was wrong to grant the sums under the heading of special damages.”

[39] The appellants pleaded special damages of Kshs.32,880,000/= which was later amended to read Kshs.40 million. To support this claim the appellants’ witness produced an invoice from the consignee of the goods M/s Caneland Ltd, which indicated that one machine was sold by the consignee to Busia Outgrowers Ltd for Kshs.8,200,000/=. The implication was that the appellants could have sold the machines at that price. We concur with the respondent that evidence of a one off sale was not sufficient to prove the market price for the goods, nor was it sufficient to prove that the appellant had a ready market for the goods. Moreover, there was no evidence adduced to show that the appellants were in the business of selling cane harvesting material, and would have indeed sold the machines for the price that Caneland did.

[40] Further, Black’s Law dictionary Ninth Edition defines loss of bargain, which it refers to as “benefit of the bargain damages,” as:

“Damages that a breaching party to a contract must pay to the aggrieved party, equal to the amounts that the aggrieved party would have received including profits if the contract had been fully performed.”

[41] We find that the appellants neither established breach nor the profits they would have made from resale of the goods. Nor are the appellants' entitled to damages for loss of bargain, as it is evident that the auction sale was nullified pursuant to a court order and not through breach of either party. In this regard, we draw inspiration from ***Southern Shield Holdings Limited v Estate Building Society [2013] eKLR***, where this Court held that a purchaser is only entitled to refund of the deposit and not damages for loss of bargain, in a land purchase transaction, that has failed due to refusal by the Commissioner of Lands to give statutory consent.

Conclusion

[42] We believe we have said enough to lead to the conclusion that this appeal has no merit. It is accordingly dismissed with costs.

Dated and delivered at Nairobi this 21st day of July, 2017

E. M. GITHINJI

.....

JUDGE OF APPEAL

HANNAH OKWENGU

.....

JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

I certify that this is a true
copy of the original.

DEPUTY REGISTRAR