IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.A.)

CIVIL APPEAL NO. 170 OF 2014

SERRACO LIMITED.....APPELLANT

AND

ATTORNEY GENERAL.....RESPONDENT

***(Appeal from the judgment and decree of the High Court of Kenya at Nairobi, (Ougo, J.) dated 24th January 2014* in HCCC NO. 401 OF 2007)**

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JUDGMENT OF THE COURT

The ***appellant, Serraco Ltd*** is aggrieved by the judgment and decree of the High Court ***(Ougo, J.)*** dated 24th January 2014 in which the learned judge dismissed its suit with costs. In the suit the appellant prayed against ***the respondent, the Attorney General***, on behalf of the former Commissioner of Police, for delivery or return to it of ***174,600*** gunny bags or payment in lieu thereof of ***Kshs 20,079,000/-***, being their value, and interest. At the conclusion of the hearing the appellant applied to amend the plaint to include a prayer for costs, which the learned judge indicated she would have granted but it was really of no moment because the court found the entire claim lacking in merit and dismissed the same.

The above prayers were based on the appellant's averments, in a plaint dated 7th May 2007, that in April 1999 it imported into Kenya ***210,000*** pieces of gunny bags, which upon arrival at the port of Mombasa were promptly stolen. Subsequently in the same month after the appellant had reported the theft to the police, they arrested some suspects and recovered 174,600 gunny bags, which the appellant claimed were part of its consignment. A criminal prosecution was instituted against the suspects and the police retained the gunny bags, to be produced in court as exhibits. The appellant lastly claimed that as a result of negligence on the part of the police, the particulars of which were pleaded, the gunny bags were lost and never delivered to the appellant upon demand, thus occasioning it loss and damage.

In its defence dated 14th February 2012, the respondent denied liability and averred that if the gunny bags were intended to be used as exhibits in a criminal trial, it was the trial court which had jurisdiction to determine to whom they should be released. The respondent further denied that the gunny bags were lost, as well as the value assigned to them and pleaded that the appellant's suit was premature, speculative and intended to prejudice the pending criminal trial. Lastly and in the alternative, in paragraph 13 of the defence, the respondent contended that the suit was time-barred and incompetent.

Benjamin Kobetbet (PW1), a director and general manager of the appellant was its only witness. The substance of his evidence in support of the averments in the plant was along the lines we have set out

above. He produced a bundle of documents as exhibits in support of its case. Among those documents is a *Proforma* Invoice addressed to the appellant and dated 30th November 1998 from ***Bangladesh Jute Mills Corporation (BJMC)*** for 210,000 pieces of gunny bags at a cost of US$ 84,000; Commercial Letter of Credit for US$ 84,000 issued by ***Kenya Commercial Bank, Kipande House***, Nairobi, on 2nd December 1998 on the application of the appellant and for the benefit of BJMC; Packing List dated 27th December 1998 for 210,000 pieces of gunny bags with BJMC as the shipper and the appellant as the notify party; a ***Bill of Lading No. MOLU 416430737*** for 210,000 pieces of gunny bags shipped to Mombasa; Import Entry date-stamped 16th March 1999 in respect of 700 bales of jute bags (210,000 pieces) with the appellant as the importer and BJMC as the supplier; Import Declaration Form showing the appellant as the importer and BJMC as the seller of 210,000 pieces of jute bags worth US$ 84,000, with Bangladesh as the country of origin and Mombasa as the port of discharge; and ***SGS Clean Report of Findings*** and ***Certificate of Origin*** from ***Metropolitan Chamber of Commerce & Industry, Dhaka,*** for 210,000 pieces of bags worth US$84,000.

In addition PW1 produced a ***Kenya Ports Authority Release Order*** date-stamped 16th March 1999 for the release of 700 bales of jute bags to ***Saroman Freight Contractors Ltd***, its clearing and forwarding agents and a copy of invoice from the said firm. It was the witness's further evidence that the bags were stolen as they were being transported from Mombasa. The theft was reported at Criminal Investigation Department (CID) Headquarters in Nairobi and shortly thereafter 5 suspects were arrested and 582 bales translating to 174,600 pieces of gunny bags, which the appellant identified as part of its consignment, were recovered from a go-down owned by a ***Mr. John Kungu***. PW1 also produced in evidence 14 Delivery Notes showing delivery of 582 bales of gunny bags from John Kungu to ***Kenya Police, Milimani, C.I.D. Department***. The deliveries were made on 23rd and 24th April 1999 and a ***Mr Siele*** duly acknowledged their receipt at C.I.D. Headquarters by signing the delivery notes to that effect.

Subsequently the 5 persons were charged in connection with the theft of the gunny bags before the ***Principal Magistrates Court, Kibera*** in ***Criminal Cases Nos. 6716 of 1999*** and ***12282 of 1999,*** which were consolidated. PW1 produced a copy of ***Kenya Police Bond to Attend Court*** as a witness in the case on 8th March 2000. His further evidence was that he attended court and testified but instead of producing the gunny bags as exhibits, the police produced photos of the gunny bags instead. By a letter dated 26th May 2004 the appellant wrote to the Director of CID asking for the release of the gunny bags but there was no reply. PW1 stated that he visited the CID many times in vain, seeking release of the gunny bags. Ultimately the appellant wrote to the Director of Public Prosecutions on 1st August 2012 complaining that upon inquiring about the criminal case at Kibera Law Courts, it was advised that the court file could not be traced. He requested for the release of the gunny bags, which he noted had been in possession of the police for more than 10 years, but again there was no reply. Lastly PW1 produced in evidence a quotation dated 4th May 2007 indicating that as of that date, the cost of a standard gunny bag equivalent to what it had imported from BJMC was Kshs 115/- apiece.

PW1 was cross-examined at length by counsel for the respondent and when the appellant closed its case, the respondent elected not to call any evidence. Both parties filed written submissions and after considering the matter, the learned judge dismissed the appellant's claim as aforesaid. She concluded that the appellant's claim was founded on negligence; that negligence was not proved; that the appellant had not pleaded detinue; that the appellant ought to have produced the proceedings of the criminal case to prove that the gunny bags were the subject matter of the prosecution; that while importation of the bags was proved there was no proof that the gunny bags were held by the police or taken to court; that it required more than one witness or further documents to prove the appellant's case; that the appellant's failure to join the Chief Magistrate's Court, Kibera, as a party in the suit was fatal; that the appellant had not proved the value of the lost gunny bags; and that the suit was time barred.

Although the appellant's memorandum of appeal contains 12 grounds of appeal, its learned counsel clustered the same into four in which he contended that the trial court erred in failing to find that the appellant had proved its case on a balance of probabilities; and by holding that the appellant had not pleaded detinue; that the suit was time barred; and that the Chief Magistrate's Court, Kibera, ought to have been joined as a party.

On the first ground, the appellant submitted that the oral and documentary evidence on record adduced by PW1 discharged the burden of proof on the appellant to the required standard of preponderance of evidence. The evidence further showed, it was urged, importation of the gunny bags by the appellant from Bangladesh; their arrival in Mombasa; clearance through the port, their theft *en route* to Nairobi; recovery of 176,000 pieces thereof, prosecution of the suspects in two criminal cases at Kibera; retention of the gunny bags by the police as exhibits; demand by the appellant for the release of the same; and refusal or failure by the police to return the bags to the appellant.

Advancing the argument, counsel contended, on the authority of ***Linus Ng'ang'a Kiongo 7 3 Others v. Town Council of Kikuyu, HCCC No 79 of 2011, John Wainaina Kagwe v. Hussein Dairy Ltd, HCCA No. 215 of 2010*** and ***Samuel Gikuru Ndungu v Coast Bus Company Ltd, CA. No. 177 of 1999***, that once the respondent elected not to call any evidence, the evidence adduced by the appellant stood uncontroverted and unchallenged and that the learned judge had placed upon the appellant a standard of proof unknown in law. In particular counsel took issue with the conclusion by the court that the case required more than one witness or further documents.

Citing ***section 112*** of the ***Evidence Act*** and the judgments of this Court in ***Kenya Power & Lighting Co. Ltd. v. Pamela Awino Agunyo, CA. No. 315 of 2012 (Kisumu)*** and ***Margaret Njeri Muiruri v. Bank of Baroda (Kenya) Ltd, CA. No. 282 of 2004***, counsel argued that the criminal prosecution and its outcome were matters within the knowledge of the respondent and that in respect thereof, the burden of proof was on the respondent. The ruling in ***Kenya Akiba Micro Financing Ltd. v. Ezekeil Chebii & 14 Others, HCCC No. 644 of 2005*** was also cited in support of the proposition that where a party is in custody or control of evidence and fails to adduce the same, the court is entitled to draw an adverse inference.

It was the appellant's contention too that the value of the gunny bags was appropriately proved and that the evidence in that regard was not controverted. On the authority of ***Rosenthal v. Alderson & Sons Ltd [1946] 1 All ER 583***, it was urged that where goods were detained and not returned, their value should be assessed at the date of judgment.

On whether the appellant had pleaded detinue, the appellant submitted that the answer was in the affirmative because it had pleaded to be the owner of the gunny bags, the circumstances under which those gunny bags ended up in the possession of the police, demand by the appellant for return of the gunny bags and refusal by the police to do so. In the appellant's view, it pleaded and proved not only detinue, but conversion as well. In addition it was contended on the authority of ***Blount v. The War Office [1953] 1 All ER 1071*** and ***Phipps v. The New Claridge's Hotel Ltd [1905] 22 TLR 49*** that the respondent was a bailee of the gunny bags.

Next the appellant addressed the issue of limitation, contending that the appellant had not pleaded the same and that on the basis of ***Baly v. Pollard & Morris [1930] 1 KB 628***, the trial court had erred by entertaining the issue of limitation. Lastly, the appellant submitted that the trial judge had fallen into error by dismissing its suit for failure to join the Chief Magistrate's Court, Kibera as a party because the appellant had no cause of action against the court and that the court enjoyed immunity while exercising judicial authority.

The respondent opposed the appeal and urged us to uphold the judgment of the trial court because the appellant did not prove its case.

It was submitted that the appellant had failed to produce documentary evidence, such as a charge sheet or proceedings to prove existence of the two criminal cases. Relying on sections 109 and 110, the respondent submitted that the burden was upon the appellant to prove its case, which it had failed to do.

On whether the appellant had proved negligence against the respondent, it was contended that the appellant had failed to prove a duty of care owed to it by the police, breach of which caused the appellant injury. The respondent further contended that the delivery notes that were produced were not authentic and that there was no evidence of the police having taken possession of the gunny bags.

Turning to the issue of limitation of actions, the respondent submitted that the issue was pleaded in the defence and that the trial court had not erred by entertaining and determining the same. Section 3 of the Public Authorities Limitation Act was cited in support of the view that an action founded on tort can only be brought against the Government within 12 months from the date when the cause of action arose.

Lastly it was also the respondent's view that the appellant had failed to prove the value of the gunny bags because the quotation produced in evidence was neither the value of the bags nor evidence of the amount paid by the appellant. It was asserted that the value of the gunny bags had to be strictly proved, which the appellant failed to do.

What is before us is a first appeal from a trial by the High Court. We are called upon to reconsider the evidence, evaluate it ourselves and draw our own conclusions. In so doing however, we must bear in mind that we do not have the advantage, which the trial court had, of hearing the single witness and seeing him as he testified. (See ***Selle & Another v. Associated Motor Boat Company Ltd & Others [1968] EA 123).***

The burden that was on the appellant was to prove the averments in the plaint on a balance of probabilities. (See ***Kirugi & Another v. Kabiya & 3 Others [1987] KLR 347.*** It is common ground that beyond cross-examining the appellant's witness, the respondent did not call any evidence either to rebut that of the appellant or to support its own averments in the defence. In ***CMC Aviation Ltd v. Crusair Ltd (No1) [1987] KLR 103*** this Court pointed out that until averments are proved or disproved or the parties admit them, they are not evidence and no decision can be founded on them. Proof is by evidence because averments are merely matters, the truth of which is submitted for investigation.

In this case, the averments by the appellant, unlike those by the respondent were backed up by both oral and documentary evidence. The respondent cannot, with respect claim in this Court that some of the documents produced by the appellant are not authentic when the record shows that those documents were exchanged in advance and admitted by the consent of the parties. The respondent also did not object to those documents at the hearing.

In ***Charterhouse Bank Ltd v. Frank N. Kamau, CA. No. 87 of 2014***, this Court stated that it is not in every case where the defendant elects not to call evidence that the plaintiff is *ipso facto* entitled to judgment. The plaintiff must first make out a case, which if not rebutted by the defendant, would succeed on a balance of probabilities. It is also apt to point out that as stated by this Court in ***Kirugi & Another v Kabiya & 3 Others (supra),*** the effect of failure by the respondent to call evidence to controvert that adduced by the appellant makes it easier for the appellant to prove its case on a balance of probabilities.

On our part, we are persuaded that the evidence adduced by the appellant shows on the whole, and on a balance of probabilities, that the appellant imported 270,000 gunny bugs from Bangladesh and duly paid US$ 84,000 to the exporter, BMJC, through a letter of credit issued by its bank, Kenya Commercial Bank. Those bags were delivered and discharged at the port of Mombasa where they were cleared and released to the appellant's clearing and forwarding agent, Saroman Freight Contractors Ltd. While being transported to Nairobi, the gunny bags were stolen but the police recovered 176,000 pieces in the possession of a Mr. John Kungu. The recovered gunny bags were removed from John Kungu's go-down to Kenya Police, Milimani, CID Department on 23rd and 24th April where they were received by an officer known as Siele.

The purpose of retention of the gunny bags by the police was to produce them at a later date in court in Kibera as exhibits, where the suspects, in whose possession the bags were found, were charged. Ten years after the criminal case was initiated, the respondent, despite demand had not restored the gunny bags to the appellant as the owner. And this was after producing in court as evidence photographs of the gunny bags rather than the actual bags.

With respect, we agree with the appellant that the impugned judgment has some fundamental flaws and misdirection. First, we do not see the legal basis for the requirement by the learned judge that the appellant ought to have called more than one witness or to produce more documents, so as to prove on a

preponderance of evidence a case, which in the first place was not controverted. By dint of ***section 143*** of the Evidence Act, unless it is required by a provision of law, no particular number of witnesses is required to prove a fact in issue. We do not find any provision of law that required the appellant to call more than one witness, particularly when the evidence of its sole witness was cogent, consistent and backed-up by documents, which were admitted in evidence by consent.

The learned judge's conclusion that the appellant's case must fail because of the omission to make the court in the criminal trial a party is equally befuddling. The case before the High Court was against the respondent for taking into possession the appellant's goods for production in court as exhibits and subsequently failing to do so or to return them to the owner, the appellant. If the case before the High Court were one where remedies such as *certiorari* to quash a decision of the criminal trial court, or *prohibition* to stop it acting in excess of jurisdiction were sought, making the trial court a party would perhaps be understandable.

Order 1 Rule 10(2) of the Civil Procedure Rules contemplates two situations where a party may be joined as a party to a suit. The first is either as a plaintiff or a defendant, while the second is where the presence of any other party before the court is necessary to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. ***(See Departed Asians Property Custodian Board v. Jaffer Brothers Ltd [1998] 1 EA 55***, Supreme Court of Uganda). To be joined as a defendant, the plaintiff must have a cause of action against the party that is sought to be so joined. We do not, in the particular circumstances of this appeal, see any basis for joining the criminal trial court as a defendant or as a necessary party. No relief was sought against that court and enforcement of whatever final order or decree the appellant obtained, could not be defeated by the absence of the criminal trial court as a party. There was also no evidence that the gunny bags were ever tendered to the court and disappeared while in its custody. In any event, once the learned judge concluded that the criminal court should have been joined to the suit, the solution was not to dismiss the suit, but to invoke Order 1 rule 10(2) under which the court is empowered, even on its own motion, to order that any party who ought to have been joined, to be so joined.

Again, the conclusion that the appellant did not plead detinue is not supported by a holistic consideration of the pleadings. While it is true that the pleadings could have been more elegant, nevertheless they sufficiently brought out the essential elements of that tort. The appellant pleaded that he was the owner of the gunny bags which were put in possession of the police for the purpose of production as exhibits in the criminal trial; that the police did not produce the gunny bags in court and that the appellant demanded the return of the gunny bags, which the police refused to do. In his prayers the appellant prayed for the return of the gunny bags or payment of their value. The pleadings leave no doubt that the appellant was asserting that he was entitled to possession of the gunny bags. It is clear that the learned judge did not consider the pleadings in their totality before concluding that detinue was not pleaded.

We would however not agree with the appellant that the issue of the claim being time barred was not pleaded. In paragraph 13 of the defence, the respondent averred that:

> ***"The defendant in the alternative and without prejudice to the foregoing avers that the suit is statute barred, incompetent and bad in law and the defendant shall before the hearing hereof raise a preliminary objection to have the entire suit struck out for incompetence."***

Indeed issue 20 as drawn by the appellant was whether the suit was statute barred, incompetent and bad in law. In light of the foregoing, the appellant cannot be heard to claim that the court determined unpleaded issues and denied it an opportunity to be heard.

In our view, the real problem with the conclusion of the High Court that the appellant's claim was time barred was the patently erroneous assumption that for purposes of limitation, the appellant's cause of action arose in 1999, when the police took possession of the gunny bags. This is how the learned judge expressed herself:

> ***"The delivery notes are dated 1999. The question I ask myself is, if there was a case at Kibera***

> ***Law Courts in 1999 when was it finalized? When did the cause of action arise? If the cause of action arose in 1999 the plaintiff had 3 years from 1999 the year the goods were delivered to the police to sue the defendant. The suit was filed in 2007. 3 years from 1999 takes one to 2002. The suit was filed 5 years later. I find the plaintiff's suit is time barred."*** (Emphasis added).

That cannot be correct because that initial possession of the gunny bags by the police in 1999 was lawful for the purpose of producing the gunny bags in court as exhibits. Such possession was not wrongful so as to constitute the basis of a course of action by the appellant. In our view the cause of action arose after the police produced in evidence photos of the gunny bags instead of the actual gunny bags, and subsequently upon demand by the appellant for the return of the gunny bags, the police failed or refused to return the same to the appellant. From the evidence, the appellant made written demand for the return of the gunny bags on 26th May 2004 and filed the suit on 7th May 2007, which would mean that it was not time barred as found by the learned judge. The judgment of the trial court was based on limitation under the Limitation of Actions Act and not under the Public Authorities Limitation Act. There was no cross appeal in that respect.

The respondent made heavy weather of the fact that it was not clear whether or when the criminal case was concluded so as to entitle the appellant to release of the gunny bags. In our view there is a simple answer in that regard. Section 112 of the Evidence Act provides that:

> ***"In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."***

The import of the above provision is that in civil cases it is the obligation of a party like the respondent in this case, who has personal knowledge of the circumstances of the case, namely what became of the appellant's gunny bags, to give evidence on his own behalf and to submit to cross-examination. His failure to do so goes to strongly discredit the truth or credibility of his case. The evidence adduced by the appellant that the police took possession of the 176,000 pieces of gunny bags on 23rd and 24th April 1999 for the purpose of producing them in court as exhibits and that instead they produced before the criminal trial court only photographs of the gunny bags and subsequently failed or refused to return the gunny bags to the appellant after due demand, was sufficient to place on the police the onus of proving the facts, which were peculiarly within their knowledge as regards the fate of the gunny bags.

As regards proof of the value of the gunny bags, the suit was filed on 7th May 2007. On 4th May 2007, the appellant obtained a quotation from a dealer in gunny bags showing that in Kenya the value of a single piece of gunny bag similar to those that it had imported from Bangladesh was Kshs 115/-. We have no hesitation in finding that Kshs 115/- was the reasonable value of each piece of gunny bag as of the time when the appellant demanded their return by the police, who failed to comply. Where for example goods are irregularly converted and are not recovered, the measure of damages is the value of the goods at the time of conversion. The appellant therefore was entitled to the value of the market price of the gunny bags, which it adequately proved. See

AKAMBA PUBLIC ROAD SERVICES LTD V. TABITHA KERUBO OMAMBIA, CA NO. 89 of 2010 (Kisumu).

We are ultimately satisfied that this appeal has considerable merit and we accordingly allow it. The judgment of the High Court dated 24th January 2014 is hereby set aside. In lieu thereof we enter judgment for the appellant for ***Kshs 20,079,000/-*** with interest. The appellant shall have costs both in the High Court and in this Court. It is so ordered.

Dated and delivered at Nairobi this 25th day of November, 2016

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR