REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT MOMBASA

Civil Appeal 85 of 2006
SUPERMARINE HANDLING SERVICES LTD.....APPELLANT

AND

KENYA REVENUE AUTHORITY.....RESPONDENT

(An appeal from the judgment and decree of the High Court of Kenya at Mombasa (Mwera, J) dated 30th September 2005

in

H.C.C.C. NO. 365 OF 2000)
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JUDGMENT OF THE COURT

Supermarine Handling Services Limited, the appellant, (hereinafter referred to as "the plaintiff") filed suit in the superior court at Mombasa on 7th August 2000 against **Kenya Revenue Authority**, the respondent, (hereinafter referred to as "the defendant") claiming Shs.23,973,305/- for alleged loss and damage due to unlawful detention by the defendant of the plaintiff's goods between 24th November 1998 to 22nd November 1999 a period of about a year. The plaint was subsequently amended on 13th September 2000.

The plaintiff's case as pleaded in the amended plaint and according to the evidence tendered in the superior court and which was not largely disputed by the defendant is briefly as follows:-

1. **Some 30 containers of Indian long grain rice (rice) were brought into the country by M/s Inchcape Shipping Services (K) Ltd. (Inchcape). They were on transit to Uganda.**

2. **Ten of those containers were cleared and transported to Uganda but the 20 remaining containers were found to contain rice that was not fit for human consumption. It was condemned and was recommended for destruction on 19/8/1998.**

3. **However, before the process of destruction was commenced, Inchcape sold the 20 containers of rice to the plaintiff.**

4. The plaintiff paid to Inchcape Kshs. 1.2 million in October 1998 for the rice "as is where is" and Inchcape informed M/s Kenya Ports Authority (KPA) and Kenya Revenue Authority (KRA) about the transaction.

5. In the same month (October 1998) the plaintiff entered into an agreement with M/s Wama Feeds Ltd of Thika who are Animal Feeds Manufacturers, for sell to them of the rice for a sum of Shs. 2.376 million, Ex warehouse Mombasa.

6. On 311/98 the plaintiff requested the Commissioner of Customs & Excise (the Commissioner) for removal of the rice to an open yard for sorting and grading. The intention was to identify the quantities suitable, for animal use so that taxes or duty thereon could be paid, and the quantity unfit for consumption destroyed under the supervision of the relevant authorities at he expense of the plaintiff.

7. Permission was granted by the Commissioner on 6/11/98 subject only, to sorting and grading being done within the Port.

8. On 1611/98 the Commissioner informed the plaintiff that the entire consignment of rice would be valued "as is" and taxes paid irrespective of whether it was suitable for use as animal feed or not.

9. Valuation was carried out by the Commissioner who assessed duty on the rotten rice at Kshs. 305,500/- and called for payment which the plaintiff effected on 24/11/98.

10. When the plaintiff called at the godowns of KPA to collect the rice in December 1998 it was refused from doing so and upon lodging a complaint, the Commissioner on 7/1/99 wrote to say the rice was condemned in August 1998 and unless there was a letter of authority from Port Health Office to confirm that the rice was fit for use or preparation as animal feed, the rice would be destroyed. Other normal importation procedures would also have to be followed including local inspection.

11. The plaintiff quickly arranged for samples to be drawn at random for analysis by the Government Chemist and the exercise was carried out through the public Health Department of the municipal council of Mombasa. The Government Chemist issued his certificate that the rice was fit for animal consumption. M/S SGS Kenya Ltd also carried out inspection on 27/1/99 and submitted their report that the rice was unfit for human consumption.

12. Despite the submission of the said reports which the Commissioner had required earlier and requests by the plaintiff for release of the rice, the Commissioner did not release it. Only 5 containers were released and transported from KPA godowns to other godowns in Buxton area but the commissioner sealed all the godowns and prevented collection of the rice.

The acts of the defendant enumerated above led the plaintiff to seek an order for mandamus to issue on the ground that the defendant's detention of the rice had no factual or legal basis and in H.C.C Misc. Civil Case No. 65 of 1999 Waki, J (as he then was) ordered the release of the rice in an order dated 8/10/99. However, as the record shows, the said order was disobeyed by the defendant leading the plaintiff to pursue contempt proceedings. Pursuant to that threat, the rice was released on 4/11/99. It is the

plaintiff's case that by the time the goods were released they had deteriorated to such an extent that they had become unfit for animal consumption.

In the superior court at Mombasa the case for the defendant and as stated in the affidavit deponed to by the Commissioner of Customs and placed before Waki J (as he then was) was that proper duty was not paid and that the plaintiff was obliged to pay duty assessed at shs. 5,287,500/. In blaming the defendant for the whole debacle that led to the unlawful detention of the goods the learned Judge held:

> **"The only bone of contention is the payment of duty which the applicant has shown he has paid as demanded by the Commissioner. But the Commissioner in turn blames himself for having applied the wrong rates and says he made corrections and demanded the proper taxes. Sadly, apart from the mere mention of it there is no record to show how the new calculations were arrived at and when demand was made for such payment. There is no explanation as to why such calculations if any are shrouded in mystery and I am bound to apply the presumption of law that evidence which can be but is not adduced, would, if adduced, be prejudicial to the party who withholds."**

The learned Judge in issuing the order of mandamus held:

> **"The applicant has complied with the law in respect of the consignment in issue and there is no reason to withhold release of his goods. The fear that it may not subsequently comply with other laws and regulations after release of the goods is irrelevant and premature as those laws or regulations are yet to be breached.**
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> **I would grant the orders sought with costs to the applicant."**

It is significant to note that the defendant did not prefer an appeal against this order.

From the record of appeal, it is evident that the plaintiff set out in the amended plaint detailed averments which clearly brought out in detail the basis of his claim, as indeed he was obliged to do. After the trial the learned Judge Mwera, J thought that the issues that fell for determination by him were as follows:-

(1) In how many containers were the plaintiff's goods subject of this suit – five (5) or fifteen (15) as per the evidence?

(2) When, where and how many containers were detained/seized by the defendant?

(3) Who stored the goods at Buxton and on what terms?

(4) Which goods were damaged/destroyed, by whom and worth how much?

On the first and the second issues the learned Judge held that he was unable to determine how many containers were actually involved because the plaintiff could not tell the court exactly their location, their number and the time at which they were stored there. This holding was based on the testimony of the

plaintiff's Managing Director Solomon Nzano (PW1) who testified that 20 containers were inspected by SGS (Kenya) Ltd and the entire rice therein was found unfit for human consumption. However, the witness also admitted that some 5 containers out of the twenty were at the same time out of the Kenya Ports Authority's yard and stored at Buxton under customs control. Also, it transpired from PW1's evidence that it was not clear how and where the 15 containers were left.

The plaintiff, however, averred that 5 containers were seized and held at a godown at Buxton, but, no valid seizure notice was shown. Again, though the plaintiff claimed Shs. 100,000/- per month as rental expenses, totaling Shs. 1,200,000/- for the 12 months the rice was held, however, PW1 admitted that the said sum was never paid. Further, it is unclear who ordered the rice to be stored at Buxton. It is plain, though, that the subject rice was not under any seizure and that the plaintiff was never denied the release of any of its rice consignment. We think therefore that the holding of the learned Judge that it had not been shown that the defendant directed the storage of the 5 containers at Buxton cannot be faulted. We thus dispose of the third issue.

The most important issue in the suit and in this appeal is how much of the rice was damaged and at what loss. The learned Judge held that only 15 containers were detained between 21/12/1998 to 4/11/1999 @ U$25 per day and allowed the claim. He dismissed the rest of the claim.

The plaintiff has appealed against this decision on three grounds of appeal which Mr. Jengo, its learned counsel argued together. The gravemen in all these grounds is that the learned Judge erred in law and in fact in not making a finding that seizure of the plaintiff's goods by the defendant was unlawful and in not taking into consideration the plaintiff's lost business opportunities which arose as a direct consequence of the defendant's actions.

It is the defendant's case in the superior court and in this appeal as vigorously canvassed before us by Mr. Matuku, its learned counsel, that whatever loss the plaintiff allegedly suffered was not proved and neither was it shown by way of evidence that the defendant was liable to the plaintiff to the tune of the sum claimed. Mr. Matuku contended that it was inconceivable that the plaintiff would have purchased rotten rice at a price of shs. 1,200,000/- and sold the same in excess of Shs. 8,707,700/- as shown by Exhibits No 1 and 13 tendered before the trial court. The learned counsel deemed the whole exercise of coming up with the figures claimed was a drilled exercise, suspicious and unrealistic.

The most intriguing aspect of this case is why the defendant gave no convincing reason for detaining the plaintiff's rice and was determined even to disobey court orders. It did not require any more

duties to be made than had been previously paid but gave a variety of excuses to withhold release. In our view, the detention of the plaintiff's rice was unlawful.

The plaintiff's case is founded mainly, on special damages which must not only be specifically pleaded but also strictly proved. The degree of certainty and the circumstances particularly of proof required depend on the circumstances and the nature of the acts themselves. See **Hahn V Singh [1985] KLR 716**.

The evidence on record as we have already stated does not show that the plaintiff's goods were seized by the defendant. Again, the ruling of Waki J (as he then was) did not find that the plaintiff's goods had been seized . All that it says is :-

> **"The applicant has complied with the law in respect of the consignment in issue and there is no reason to withhold release of his goods."**

The plaintiff's complaint, therefore, has no basis and we reject it. This being out view of the matter in issue the learned Judge (Mwera J) could not proceed to consider non-proven lost business opportunities. Consequently, this ground of appeal fails.

The testimony of PW1 is not clear as to how much of the rice was damaged and at what loss. As opined by Mwera J it could not be established whether the loss was concentrated in the 5 containers at Buxton or in a different lot among the total consignment. We think that this conclusion by the learned Judge must be sustained and we reject any complaint against it.

Mr Jengo also submitted that it was an error on the part of the learned Judge not to award the plaintiff interest and costs having found that it was entitled to Shs. 8,174,925/- for demurrage charges.

It is trite law that the justification for an award of interest on the principal sum is, generally speaking, to compensate a plaintiff for the deprivation of any money, or specific goods through the wrong act of a defendant. In **Later v Mbiyu [1965] EA 592,** the forerunner of this Court said at page 593 paragraph E.

> **"In both these cases the successful party was deprived of the use of goods or money by reason of the wrongful act on the part of the defendant, and in such a case it is clearly right that the party who has been deprived of the use of goods or money to which he is entitled should be compensated for such deprivation by the award of interest".**

The plaintiff was deprived of the use of its money since 4/11/1999 and it was only fair that it should be compensated for such deprivation by the award of interest. However, as the liability of the defendant to

pay for the plaintiff's loss was not determined until the date of judgment, interest shall be payable from 30th September 2005. We are, satisfied, therefore, that the learned Judge's order in denying the plaintiff interest was erroneous and was not in consonance with the normal practice and was plainly and obviously a wrong exercise of discretion. See **New Tyres v Kenya Alliance Insurance Company Ltd [1987] KLR 380.**

Costs of any action, cause or other matter or issue shall follow the event unless the court or Judge shall for good reason otherwise order. See **Section 27 (1)** of the Civil Procedure Act.

In the case **Devram Dattan v Dawda [1949] EACA 35** it was held,

> **"It is well established that when the decision of such a matter as the right of a successful litigant to recover his costs is left to the discretion of the Judge who tried his case, that discretion is a judicial discretion, and if it be so its exercise must be based on facts....If, however, there be, in fact, some grounds to support the exercise by the trial Judge of the discretion he purports to exercise, the question of the sufficiency of those grounds for this purpose is entirely a matter for the Judge himself to decide, and the Court of Appeal will not interfere with his discretion in that instance."**

Thus, where a trial court has exercised its discretion on costs, an appellate court should not interfere unless the discretion has been exercised unjudicially or on wrong principles. Where it gives no reason for its decision the Appellate Court will interfere if it is satisfied that the order is wrong. It will also interfere where reasons are given if it considers that those reasons do not constitute "good reason" within the meaning of the rule.

In the appeal now before us, the learned Judge gave no reasons whatsoever for his decision to deprive the successful plaintiff of its costs and yet it was shown that the defendant had been guilty of some misconduct which led to litigation. In our view the learned Judge's order was wrong.

For the aforegoing reasons, the plaintiff's appeal only succeeds as to the award of interest and costs on the principal sum awarded by the learned Judge (Mwera, J). The rest of the grounds of appeal are rejected.

For the avoidance of doubt, we make the following orders:

1 The order for the payment of Shs. 8,174,925/- is upheld.

2 The said award shall bear interest at court rates with effect from 30th September 2005 until payment in full

3 The plaintiff shall have the costs of the suit in the High Court.

4 The plaintiff shall be entitled to half (1/2) of the costs of the appeal as it has partly succeeded.

To that limited extent is this appeal allowed.

Dated and delivered at Mombasa this 12th day of March, 2010.

P.K. TUNOI

.....
JUDGE OF APPEAL

E.O. O'KUBASU

.....
JUDGE OF APPEAL

ALNASHIR VISRAM
.....
JUDGE OF APPEAL

I certify that this is a
true copy of the original

DEPUTY REGISTRAR