



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

CIVIL CASE 1610 OF 2001

SATWANT SINGH DHANJAL & 2 OTHERS.....PLAINTIFF

VERSUS

KENYA REVENUE AUTHORITY.....DEFENDANT

JUDGMENT

In a Plaint filed on 18.10.2001 but not dated, the Plaintiff herein prayed for judgment against the Defendant for:-

- (a) Special damages in the sum of Kshs 32,800,000/= as pleaded in paragraph 23 of the Plaint;
- (b) general damages for breach of contract
- (c) punitive and exemplary damages
- (d) costs of this suit
- (e) interest on (a) (b) (c) and (d) above at court rates from the date of judgment until payment in full;
- (f) such further or other orders as this court may deem fit to grant.

Paragraph 23 of the Plaint contained the Plaintiffs averment that they would have made a profit of at least Kshs 32,800,000/= had they taken possession of and resold the goods. The other averments upon which the Plaintiffs rely in support of their claim are set out in paragraphs 4, through to 8 inclusive. These facts were regurgitated by PW1 Satwart Singh Dhanjal in his evidence given on 1.11.2004 that:

- Pursuant to the provisions of Section 34 of the Customs and Excise Act the Commissioner of Customs and Excise held an auction on 24.04.2001 at Kilindini for the sale of various goods which had been ware housed at the Customs Warehouse at Kilindini

- The goods which were to be sold at the auction were some tractor equipment in two “40ft” and “20ft” containers described in paragraph 5 of the Plaint.
- The Plaintiffs’ bid through one Mr. Bipin of Bhavin Motors Ltd was, at shs 7,120,000/= the highest and was accepted by the Defendant upon the Plaintiffs payment of 25% of the purchase price in the sum of Kshs 1,800,000/= and not Kshs 1,800,800/= as stated in the said paragraph of the Plaint. The Plaintiffs paid the balance of the purchase price in the sum of Kshs 5,320,000/= and which sum was duly acknowledged by the Defendant;
- The Plaintiffs were stopped from collecting the goods by a court order issued in Kisumu High Court Miscellaneous Application No. 74 of 2001 (Republic Ex Parte Caneland Limited vs Kenya Revenue Authority & Another) which order granted leave to the Exparte Applicant therein to commence proceedings for orders prohibiting the Defendant herein from selling, disposing or otherwise alienating the said goods:

In their statement of Defence dated 20.11.2001 but filed on 26.11.2001, the Defendant admitted the facts as stated above, and DW1 Mr. Peter Mutua Makuli (the only witness called by the Defendant) confirmed the above, after describing in some detail the procedures adopted by the Defendant in accordance with the Customs and Excise Act, before unaccustomed goods are sold by public auction. In essence he (DW1) concluded that if it were not for the order of the court in Kisumu High Court Misc. Application NO. 74 of 2001 Republic (Ex parte) Caneland Limited and Kenya Revenue & Authority Bhavin Motors) the Defendant would have handed over delivery of the goods sold at the public auction to the Plaintiffs. In the event, the goods were never delivered to the Plaintiffs and so the Plaintiffs claim for judgment in the prayers first out above set out.

The basis of the Plaintiffs claim is set out in paragraphs 11, 12, 13, 14, 15, 16 and 18 of the Plaint that –

(a) Upon the fall of the hammer at the auction and subsequent payment of the deposit and the balance of the purchase price the title in the goods passed to the Plaintiffs, and the Defendant only became a bailee of those goods and its duty was to take care of them and deliver them to the Plaintiffs order as bailor.

(b) The Prohibitory order was granted on 5.07.2001 long after title in the goods had passed to the Plaintiffs

(c) By holding the public auction the Defendant warranted that it had power to deal with the goods in accordance with the provisions of section 34 of the Act, and that such power had accrued and was exercisable by the Defendant.

(d) The Plaintiffs bought the said goods solely upon reliance on those representations and warranties by the Defendant

(e) The sale of the goods having been made pursuant to a statutory power under s. 34 of the Customs and Excise Act, the sale could not be challenged,

(f) By reason of the prohibitory orders sought and issued against the defendant, the Defendant was in breach of the warranties and representations to the Plaintiffs and which breach has caused the Plaintiffs serious loss and damage and for which the Plaintiff claims damages.

(g) The Plaintiff bought the goods in good faith and that at the time the order was issued, title in the goods had passed to him, the Plaintiffs were unaware of any challenge to the sale

(h) The Plaintiffs lost a substantial profit as Caneland Ltd allegedly sold the goods at upwards of Kshs 40 million;

And for all these reasons they should be recompensed in the manner prayed in the plaint.

The basis of the Defendants case is that they were stopped by a lawful order issued in Kisumu High court **Misc. Application No. 74 of 2002 Republic Exparte Caveland Ltd versus Kenya Revenue Authority and Bhavin Motors Ltd**. The Plaintiffs were aware of the order. Bhavin Motors Ltd who were the successful bidders were agents of the Plaintiffs. This aspect was confirmed by the Plaintiffs principal witness PW1, Satwart Singh Dhanjal that a Mr. Bipin of Bhavin Motors Ltd, Mombasa who were the Plaintiffs' agents at the auction, was also his friend. The Plaintiffs were well aware of the proceedings in the said case and of the subsequent order in the matter. I so find.

However, before arriving at any other finding in this matter, I must first consider other issues raised by Counsel for both parties and pertinent to this suit.

Firstly is a public auction pursuant to a statutory power different from any other action"

Secondly, what warranties and representations (if any) are implied by a seller at a public auction"

Thirdly when does title in the goods pass to the bidder or purchaser at an auction sale"

Fourthly, irrespective of the time when title in the goods passes at an auction sale what is the effect of a successful challenge in court of an auction sale whether held under the statutory power of sale or otherwise

Fifthly what damages if any flow from an aborted or annulled public auction"

Firstly auctions are of different types. There **are auction marts of the rich and famous**. Rare pictures or master pieces, old car models, are offered for sale by their owners basically to get the highest price or value for their items offered on sale. It is usually implied that the persons offering the goods for sale, have title in those goods, and the purchasers get good title in them. No good title however passess where it is discovered that the goods were stolen **Nemo dat quod non habet** (no one can transfer a better title to goods than he himself posses (a thief cannot give a good title.) This is therefore an auction of goods offered by volunteers and owners who wish to change their investment or get rid of old and unwanted items.

Secondly, and by far the commonest is the **forced sale** auction. There are three types of this type of auction. There is the sale by the pawnbroker, where the pledgor of the goods fails to pay or collect his goods upon the appointed time and the pledgee sells them to recover his money for which goods were pledged in the first instance. There is the sale by the **bailee of the goods** where the bailor fails to collect and pay for them. This happens a great deal under the **Disposal of Uncollected Goods Act** (Cap 38, Laws of Kenya) and the **Pawnbrokers Act (Cap 529)** Laws of Kenya). A vehicle owner deposits his motor vehicle with a garage owner, the garage owner incurs costs in the purchase of spares and labour in the repair of the motor vehicle. The owner fails to pay. Under those conditions the garage owner, or **pawnbroker** may sell the goods.

By far however, the most common or most familiar with the lawyers, is the sale of land by **Banks as mortgagees** pursuant to the statutory power of sale reserved in their favour in mortgage instrument or charges. This is also a regular occurrence under the **Customs and Excise Act (Cap 472, Laws of Kenya)**. In these statutes the power to sell or as is commonly expressed the **statutory power** of sale is said to arise after the happening of an event, usually failure to pay the mortgage money under the mortgage instrument or charge. The power is said to be exercised after the expiration of the statutory notice. If the statutory notice expires, and the owner of the land (in the case of mortgages or charges) does not pay or as they say redeem the mortgage, the mortgagee Bank will then exercise its statutory power of sale. He may sell by private treaty or by public auction. In either case, he must look for the best price, a price equal to or above the reserve price where there is such reserve price.

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.

The third question I posed was, when does title in the goods pass to the purchaser at an auction" Title in the goods in my view passes to the purchaser at an auction in terms of the rules of the auction. In this case the rules were that the highest bidder pays 25% of the bid price, and the balance within the specified time. However, the sale was not in terms of Section 227 of the Customs and Excise Act subject to any law relating to auctioneers completed upon the fall of the hammer. The sale itself was an exercise of a statutory power by the Defendant and the sale having been stayed by an order of a competent court, and no appeal having been preferred by the Plaintiffs' agents namely Bhavin Motors Ltd, that order was binding upon the Defendant who could not therefore pass any title in the goods to the Plaintiffs.

Besides, it is I think a misnomer in law, to speak of the Defendant passing title in the goods to the Plaintiffs. In an auction sale like the one in this case conducted pursuant to a statutory power, title passes to the purchaser by operation of law and not because the Defendant or the person exercising the statutory power of sale, has any title in the goods. The issue of title passing to the Plaintiffs by the Defendant does not arise.

Secondly, on this point, whereas it is a cardinal principle of our law that rights to property are protected and therefore the person who takes or buys goods in good faith and for value and without notice should get a good title, an owner of goods who has an immediate right to possession of goods is entitled to recover possession of them from a person who is wrongfully in possession of the goods. He may either retake them without action or bring action for delivery up of the goods, or for damages for wrongful interference.

In the instant action, the auction sale having been challenged (although the bid price was paid in full), the Defendant having been prohibited from delivering up the goods to the Plaintiffs or its agents by a court of competent jurisdiction, the Defendant was therefore excused from completing the auction sale by delivering up the goods to the Plaintiffs or the Plaintiffs agents. This is unlike the usual case of auction of land, the sale is completed and the statutory right of redemption is extinguished the moment the bid is accepted and the bidder pays the bid price. The only exception is in cases of fraud where the sale may be set aside. In all other cases, the owner's remedy is in damages only, and not restitution or restoration of the property sold by an auction. The Plaintiffs' case was sealed by the order made on 26.04.2001 in Kisumu H.C.C. Misc Application No. 74 of 2001 which operated as a stay. This order was confirmed by the order of that court made on 5.07.2001 annulling the auction sale by the Defendant. The Plaintiffs remedy therefore remained in damages only.

The Plaintiffs claimed special damages in the sum of Kshs 23 million. As proof of this claim, the Plaintiff's witness Satwart Singh Dhanjal submitted Plaintiff's Exhibit No. 8, a quotation dated 15.11.2001 from Caneland Ltd for the sale of one piece of machinery, CAMECO SP1800B Cane Loader together with accessories for the price of Ksh 8,200,000/= and delivery within 60—90 dyas.

PW1, Satwart Singh Dhanjal also produced Exhibit No. 9 a certified copy of an Invoice No. 131 dated 18.09.2001 for the sale of CAMECO Model NO. 1800B Tractor for the price of Kshs 8,200,000/= to Busia Sugar Out growers Co. Ltd. PW1 also produced to the Court original Receipts Nos 1865857 of 24.04.2001 for Kshs 1,800,000/= and receipt No. 1866033 of 26.04.20001 for Kshs 5,320,000/=

The object of pleading special damages is to let the defendant know what charges he must prepare to meet and to give him an opportunity of inquiring into the allegations of damage before he comes into court. The claim must also be proved. A quotation from the competitor or Caneland Ltd or an invoice to Busia Out Growers Co Ltd for the sale to either the Plaintiffs themselves or to the said Busia Outgrowers Co. Ltd is not proof of the loss of Kshs 23 million. "**Special Damage**" is as I understand it, in law, an expression which denotes a "**sum**" which the Plaintiff has actually suffered by expending it from the Plaintiffs' own resources. There is no proof here that the Plaintiff expended Kshs 23 million, I therefore refuse to entertain, let alone grant this leg of the Plaintiff's claim. It is refused.

If I am wrong in this conclusion Section 212(3) of the Customs and Excise Act aforesaid seems to put the matter beyond per adventure. No damages are payable in these circumstances. The Plaintiffs also sought orders for general, punitive and exemplary damages.

Mr. Matuku, learned Counsel for the Defendant referred the Court (in his submissions) to the Provisions of Section 212(3) which the said Counsel said, expressly prohibited the Court from awarding either damages or costs to a successful Plaintiff. Section 212(23) of the Customs and Excise Act, (Cap 472, Laws of Kenya) provides –

212(1)

(2)

(3) Where proceedings are brought against an officer on account of an act done whether by 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 be otherwise entitled to damages and no costs shall be awarded to either party”

This Section appears to me to contradict both Section 206(3) of the Customs and Excise Act, and Section 22(3) of the Kenya Revenue Authority Act, 1995 (No 2 of 1995).

Commencing with the latter Act, Section 22(3) provides that all legal proceedings and claims which before the commencement of the Kenya Revenue Authority Act were pending under the Customs and Excise Act, and other Acts listed in the Schedule to the Act, would be continued or enforced by or against the Authority (that is, the Defendant) in the same manner as they would have been continued or enforced if this Act had not been enacted.

Although the provision does not say that all subsequent suits for claims under the listed statutes would be commenced by or against the Authority, I think it is sufficiently clear that such suits would in future be commenced by or against the Authority. Besides however, the substantive law applicable to the claims or actions in issue is as set out in the statute governing the particular subject under which the claim arose. In this case, the applicable statute is clearly, the Customs and Excise Act.

In contradistinction to Section 212(3) of the Customs and Excise Act, & *(which prohibits the award of damages and costs to a successful Plaintiff)*, Section 206(3) of the said Act expressly suggests that both damages and costs may be awarded against the Authority. The said Section provides as follows –

206 (1)

(2)

(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 these damages and costs shall be paid out of the monies appropriated for the administration of the Customs and the Commissioner shall not be personally liable therefor”

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).

Alas, I do not understand the distinction between an action against the Commissioner of Customs and Excise (in his representative capacity), or (now the Kenya Revenue Authority) and an action against an officer of the Customs and Excise Department (in his presumably personal capacity) and in which event the officer would not be liable in damages or costs, but the Commissioner of Customs and Excise (or the Authority) would, if found so, be liable in damages and costs. Fortunately for me, I am not called upon to decide upon these apparently contradictory provisions for when is the Commissioner of Customs and Excise, or an officer of that Department acting otherwise than in his representative capacity on behalf of the Department or now the Authority unless of course he was acting fraudulently or otherwise contrary to law. To that extent therefore the distinction made by the provisions make little sense, and I urge the Authority to look at them soonest, and rewrite them.

Reverting to the immediate issue of the claim for general, punitive and exemplary damages, Mr. Theuri learned Counsel for the Plaintiffs in his written submissions made detailed references to the provisions of the **Sale of Goods Act** (Cap 31 Laws of Kenya) and also to many authorities in support of the proposition that the auction sale giving rise to his suit was subject to the provisions of the Sale of Goods Act, and therefore giving rise to damages as a consequence of the breach of such contract of sale. Learned Counsel also cited many authorities giving rise to damages as a result of the breach of a contract of sale under the **Sale of Goods Act**. This cannot however be, in my respectful opinion.

Firstly Section 225 of the Customs and Excise Act prohibits the application of any other law in relation to auctioneers in auctions under the Act. This means that the Auctioneers Act 1995 does not apply to an auction under the Customs and Excise Act.

Secondly, as I have endeavoured to show in the earlier part of this judgment an auction sale is not a normal contract of sale subject of the Sale of Goods Act. 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.

The Defendant did however concede that it is holding the sum of Kshs 7,120,000/= to the account or order of the Plaintiffs. The Plaintiffs claimed interest on this sum. I do order that the Defendant do forthwith pay said sum to the Plaintiffs together with interest thereon, as for the sum of Kshs 1,800,000/= from 24.04.2003 to 26.4.2003, and as to the sum of Kshs 7,120,000/= from 26.4.2003 till the date of filing suit, and thereafter to the date of judgment, and from the date of judgment to the date of payment in full. Interest shall be at court rates.

This leave me to consider the question of costs. I have made reference to section 212(3) which prohibits the court from awarding damages and costs to a successful Plaintiff, but only restore to the Plaintiff the goods seized, or pay the value thereof. I have dealt with the issue of damages. I will now deal with the question of 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. I have dealt with the issue of damages, and for the reasons adduced, I declined to order the same against the Defendant. The suit here is against the Authority and not an individual officer of the Customs and Excise Department. The provisions of Section 212(3) of the Customs and Excise Act are therefore inapplicable. The applicable provisions are those of section 206(3)(b) of the said Act, and this court is therefore competent to make an order for costs against the Defendant in favour of the Plaintiffs.

It seems to me that there is usually lapse of considerable time between the time unaccustomed or unentered goods are removed by the Kenya Ports Authority to the Defendants' Warehouse for disposal in accordance with the Customs and Excise Act. There seems to be for lack of a better expression absence of accurate communication or information as to why some goods are not entered as they should and end up being warehoused by the Defendant for purposes of disposal in accordance with their nature, and in this case, sale by public auction. All this arose in my respectful view due to lack of proper and accurate communication and attention to record. If there had been proper communication between the Kenya Ports Authority and the Defendants Customs and Excise officers, it is not likely that the Plaintiffs would have embroiled themselves in the auction through their friend Bipin Rathod of Bhavin Motors Ltd. Mombasa, and would most certainly not have been engaged in this litigation.

For these reasons, I will also grant the Plaintiffs the costs of this action.

There shall be orders and decree accordingly.

Delivered and dated at Nairobi this 15th day of July, 2005

ANYARA EMUKULE

JUDGE



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