



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**CIVIL CASE NO. 361 OF 1976**

**JACOB LUKE THUO.....PLAINTIFF**

**VERSUS**

**ATTORNEY GENERAL.....DEFENDANT**

**JUDGMENT**

The plaintiff claims Shs 1,300,000 being the value of 3150 bags of sugar which were seized by the Ministry of Commerce and Industry over the weekend of Friday 22nd to Monday 25th November 1974 from a warehouse of Bhagani Warehouses Ltd, Mombasa.

Although there is an acute conflict of evidence as to the events attendant on and subsequent to the seizure of the sugar there are certain other matters which are not in dispute.

By the Imports, Exports and Essential Supplies (Sugar, Jute and Sisal) Order (Gazette Notice 3538 of 24th November 1972) it was directed that no person who is not a *bona fide* agent of the Kenya National Trading Corporation Ltd (hereinafter referred to as "KNTC") may store, possess for sale or dispose of sugar in quantities exceeding 1000 kilogrammes net weight in bags without a permit issued by the Director of Trade and Supplies. This means ten bags as there are 100 kg in a bag. KNTC has a monopoly in the distribution of sugar in Kenya. On 13th June 1973 the plaintiff registered his business, the name of which was changed to "Mbauni Wholesale Traders" on 25th May 1974. On 6th September 1973 he was appointed a KNTC agent for the distribution of sugar in Mombasa Town. Annual certificates of his appointment were issued in 1973-77. He is still an agent. In fact only African citizens are appointed as agents.

In October and November 1974 there was a shortage of sugar in Mombasa. It was suspected that this was due to hoarding by traders. The Ministry decided to send Mr John Mucoki, the Director of Supplies, to Mombasa to look into the matter. He arrived here on 22nd November. On Saturday 23rd November with two inspectors of police attached to the Special Branch, Leonard Kwonji and Benson Machiri, and also Mr A K Wainaina, the KNTC depot manager at Changamwe, they seized 3150 bags of sugar, and had it removed to the KNTC depot. The seizure was presumably made under section 15 of the Imports, Exports and Essential Supplies Act as on 5th June 1975 the state counsel, Mombasa, applied to the Senior Resident Magistrate under section 17 of the Act for an order for the disposal of the sugar. In his ruling dated 20th June, the magistrate refused to make the order sought as the seizure had not been reported to him forthwith and sugar was not goods of a perishable nature. Further, he held that

the application could not succeed under section 18 as the sugar had been retained for a period exceeding one month and no proceedings had been taken for an offence under the Act within that period.

On 26th June 1975 Mr Mucoki wrote to the general manager, KNTC, Nairobi, and the Kenya Farmers Association, Mombasa, ordering the sugar to be sold owing to its deteriorating condition. This was done. No reliance as a defence is now placed on the fact that the Ministry was no longer in possession of the sugar when the letter of demand was written on 29<sup>th</sup> April 1976 followed by the denial of liability by the Ministry on 5th May 1976.

[His Lordship then considered the evidence in dispute and concluded:] The plaintiff has not discharged the onus of proving that he was the rightful owner of the 3150 bags of sugar. That is sufficient to disprove the suit; but, in the event of an appeal, I will give my findings on the legal issues raised.

Mr Salter submits that once the Ministry of Commerce and Industry had exercised its legal right to seize the goods under section 15 of the Imports, Exports and Essential Supplies Act, it remained under a continuing duty to return them and that the cause of action did not arise until 5th May 1976 when it refused to return them and so converted them to its own use; so that when the plaint was filed on 29th June 1976, it was well within the twelve months period allowed by section 3(1) of the Public Authorities Limitation Act 1974. On the other hand, Mr Gautama, for the Attorney General, contends that as the plaintiff's case was that the Ministry had unlawfully seized his goods on 23rd November 1974 that constituted a trespass to them and the cause of action arose on that date. He referred me to *Cullen v Parshan and Hansraj* [1962] EA 159, 162, where in a case of bailment trover Newbold JA said:

In trover the wrong exists from the moment of the conversion and though there may be a demand and refusal, the refusal is not of itself a conversion but merely evidence of a precious conversion.

I think that that is the position here and that the abortive proceedings under sections 15, 17 and 18 of the Act are not really relevant to the present claim. If the Ministry was in unlawful possession of the plaintiff's goods (which I have held it was not as he had disclaimed ownership of them), he should have instituted proceedings within the twelve-month period. He was well out of time and his suit is barred by limitation.

On Mr Salter's alternative submission that the Ministry had compulsorily taken possession of them under section 75 of the Constitution and the plaintiff was entitled to compensation and, as under subsection (3) the Chief Justice had failed to make rules with respect to practice and procedure in relation to the jurisdiction conferred upon the High Court by subsection (2), the ordinary three-year period of limitation for an action founded on tort by section 4(2) of the Limitation of Actions Act 1968 applied, the answer is to be found in subsection (6)(a)(vi) of section 75 which provides that nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of subsection (1) or subsection (2) of the section in consequence of any law with respect to the limitation of actions. The 1974 Act is just such a written law. This submission fails.

*Action dismissed with costs.*

**Dated and Delivered at Mombasa this 21st day of April 1977.**

**D.J.SHERIDAN**

**JUDGE**



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