Case Number:	Civil Suit 221 of 2004
Date Delivered:	31 Jan 2018
Case Class:	Civil
Court:	High Court at Mombasa
Case Action:	Judgment
Judge:	Patrick J. Okwaro Otieno
Citation:	Mohamed Saleh & Company v Kenya Revenue Authority [2016]eKLR
Advocates:	-
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Mombasa
Docket Number:	-
History Docket Number:	-
Case Outcome:	-
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 221 OF 2004

MOHAMED SALEH & COMPANY.....PLAINTIFF

VERSUS

KENYA REVENUE AUTHORITY.....DEFENDANT

J U D G M E N T

Outline of facts

1. In this suit, the plaintiff has sued the defendant for the recovering of Kshs.5,936,880/= storage charges and USD 208,320/= being demurrage charges on account of the defendants wrongful conduct of demanding customs duty on zero rated comesa sugar.

2. By an order issued in Mombasa HC Miss Application No. 643 of 2003,(JR) the court found and held that the Respondent then, now the defendant, had no legal basis to refuse to process the applicants importation documents and to release the subject sugar on a zero% rated duty and to waive customs warehouse rent, bear go down (warehouse) storage and container demurrage charges in respect of the subject consignment.

3. The plaintiff pleaded that upon being served with the prerogative orders, the defendant did waive the customs duties levied but failed to bear the other charges in the sum of:-

Warehouse(Godown) storage charges Kshs.5,936,880.00

Demurrage Kshs. 208,320.00

4. That is the liquidated the plaintiff seeks to recover from the defendant by this suit.

5. When served the defendant did file a statement of defence dated 29/6/2005 in which it admits the description of the parties and the filling of H.C. Misc Civil Application No. 643 of 2003 but it is denied that the said matter challenged any wrongful acts by the defendant but the legitimacy of a subsidiary legislation. Additionally it was pleaded that the order that ensued from the matter did not decide the merits of the dispute at all and that the defendant did comply with the order in full and nothing remains outstanding. It was further pleaded that even though demand was made, no compliance was made towards the requirements of section 13A Government Proceedings Act as read with Section 3(2) of Kenya Revenue Authority Act and that the plaintiff had in HC Misc. Civil Application No. 643 of 2003 drawn and filed a bill of costs and sought to recover the sums pleaded and claimed at paragraph 6 & 7 of the plaintiff in this suit.

6. In support of its claim the plaintiff filed a witness statement dated 7/9/2015 by one Abdul Aziz Mohammed Swaleh Bawazir and a list and bundle of documents dated 11/7/2007. On the part the

defendant, a witness statement and bundle of documents were filled on the 19/4/2017 over and above an earlier list of documents dated 9/12/2010 and filed in court on the 30/3/2011.

7. The suit was initially heard before Prof. J.B Ojwang J, on the 10/2/2011 when PW 1 gave evidence but counsel for the defendant sought and was granted an adjournment because he needed to prepare for cross examination. That however was not to be because the judge left the court and on the 23/6/2015 the parties recorded a consent that the matter starts *denovo*.

8. On the 1/12/2016 when the matter came up for hearing once again, it did not proceed as the defendant made an application for an adjournment to enable the parties negotiate a settlement. That adjournment was allowed not to facilitate negotiations principally but to enable the defendant file and serve a witness statement. It was additionally directed that at trial each party would call only one witness who would adopt the statements filed and produce the bundles of documents filed without the need to call the makers thereof.

9. Come the 8/3/2017, the defendant was still seeking an adjournment to enable parties negotiate and record a settlement but the court did not accede to request and PW 1 gave his evidence and was cross examined only for the parties to agree on entry of partial judgment in the sum of USD104,160/= being 50% of the demurrage charges.

10. On the same day one Ms. Hamadi advocate who appeared for the defendant announced that the defendant would not call a witness on the basis that it had not filed a witness statement as ordered on the 1/12/2016.

11. Parties then offered oral submissions and judgment was reserved for the 7/4/2017. However the judgment could not be delivered because on the 7/4/2017, the defendant filed an application of the same date seeking that the judgment not be delivered, the order of the court dated 8/3/2017, closing the defendants case, be set aside and leave be granted for the defendant to file a witness statement and call a witness in support of its defence.

12. Parties then attended court on the 19/4/2017 and recorded a consent which essentially reopened the defence case and a witness statement filed in court the same day was deemed duly filed and the maker therefore given a chance to give evidence by being cross examined.

13. That piece of evidence by DW 1 was to the effect that the reason the defendant stopped the release of the imported sugar was an alleged exhaustion of the COMESA quota which the court quashed in JR Misc. Application No. 643 of 2003. Upon the determination by the court, the defendant released the sugar at zero percent duty and waived customers warehouse rent but contests the payment of the sum sued upon on the basis that it was doubtful if the sum was ever paid.

14. On the sums sued upon the witness contend that the container freight station confirmed to the defendant that it was only paid handling charges and not container freight storage charges and that only half the demurrage charges were paid in the sum of Kshs.104,16USD. In cross examination the witness stated that in the year 2003-2004 he was not involved in the matter and could not tell how my days the cargo took at the port and the CFS. He also confirmed that the defendant did not pay the customs warehouse rent as well as the demurrage charges as ordered by the court. He however was unable to identify who confirmed him that the CFS had waived the container freight storage charges. On re-examination the witness repeated that he was unable to ascertain the demurrage and storage charges paid.

15. Upon close of the defendants case, as re-opened, parties filed written submissions on different dates. The plaintiff's submissions are dated 15/5/2017 and filed on 17/5/2017 while those by the defendant are dated 20/5/2017 and filed in court on the 24/5/2017.

Submissions by the plaintiff

16. To the plaintiff, the part of the claim in US Dollars remain settled by a consent judgment entered on 8/3/2017 in the sum USD 104,160 and therefore the only dispute before the court is the sum of Kshs.5,936,880/= being storage charges. The plaintiff takes the position that the sum it did pay to the container freight station was indeed storage charges and not handling charges as contended by the defendant.

17. On the difference between the sum claimed and the payment receipts the plaintiff took the position that the sum of Kshs.413,149/= remain outstanding as unpaid. Those are the same submissions Mr. Mogaka highlighted in court only adding that the foundation of this suit is the judgment in JR No. 643 of 2003 to which no appeal has been preferred and further that both sides had exhibited a debit not for storage and not handling charges. He prayed that the claim be allowed as prayed.

Submissions by the defendant

18. Mr. Ontweka for the defendant also filed submissions and proceeded from the point of view that the entire claim as pleaded and prayed was not due for determination by the court. Submissions were offered to the effect that prior to the court order in JR No. 643/2003 it was obligated to implement the importation of sugar under section 118 Customs and Exercise Act and Legal Notice No. 156 of 12th September 2003 and that the claim ought to have been closed the moment the sugar was released duty free.

19. On the evidence adduced to support the claim submissions were offered to the effect that the storage and demurrage charges are due for any importer every time they import. To the defendant the cargo was released from the port on 14/8/2003 and started incurring storage charges even before the JR was filed on 23/9/2003. For that period the defendant contends it cannot be held liable and therefore ought to be deducted from the sum claimed on *pro-rata* basis.

20. On the demurrage sum of USD 208,000 the defendant submitted that it is curious that the plaintiff has opted to abandoned half thereof without explanation to cover failure to provide evidence. To the defendant, the debit notes and invoices are not sufficient proof. It is equally submitted that even demurrage charges ought to be prorated and the defendant made liable only for the period it withheld the good unlawfully. On storage charges the defendant took the view that the document at pages 8,9,10 & 11 show that these were expenses incurred by engagement of a clearing agent.

21. The defendant then submitted that the court was bound to protect public interest in this litigation in that the plaintiff ought to be held to have failed on his duty to mitigate own losses. The effect of the submission is that the plaintiff ought to have mitigated own losses by paying the self-assessed duty of Kshs. 7,461,614/= to avoid damages escalating. The counsel then cited the decision by the Court of Appeal in ***Great Lakes (V) Ltd vs Kenya Revenue Authority*** for the proposition that a party cannot throw evidence at the judge not linked to the pleadings.

22. Thika Coffee Mills vs Mikiki Farmer Coop & Another [2013] eKLR was also cited for the proposition that parties are bond by then bargain and a Court of Law has no duty of write to re-write a contract for the parties. Even an opinion by the house of records in ***JI Mcmillian Company Inco. vs***

Mediteranean Shipping SA [2005] UK HLII was relied the proposition that there is a mechanism outside court for resolution of disputes on transport of goods by sea.

23. Additionally cited to court were the decisions in ***Suleiman Shabbal vs I.E.B.C and Institute of Social Accountability & Another vs National Assembly*** all for the proposition of law that where a court declares a law unconstitional, the executive ought to be given time to enact a new law. For those many reasons it was urged by the defendant that the suit be dismissed.

Analysis and determination

24. This being a liquidated claim, the only issue for determination is whether or not the plaintiff has proved its case on a balance of probabilities that it did incur storage expenses in the sum of Kshs.5,936,880/= at HABO Agencies Ltd on account of its cargo imported into Kenya and determined by the Defendant till the Court directed the same to be released. That is the only issue because the claim for demurrage charges was settled by consent and this court has no business revisiting the consent recorded by the parties.

25. There is no question for the court to determine whether the detention of the cargo on account of demand for customers duly because that was fully and exhaustively determined by the court in JR No. 643 of 2003 by a judgment dated 15/12/2003. That judgment resulted in an order being extracted and dated 15/12/2013. The order compelled the Respondent to "process the Applicants import documents and release the imports under declaration pool no. 869248 on zero percent (0%) rated applicable on sugar from COMESA Region before 12/9/2003 to the applicant, waive custom warehouse rent and bear godown storage charges and container demurrage charges in respect of the subject consignment".

26. It is common ground that the Respondent indeed released the sugar and waived customs warehouse rent as ordered but did not pay for the Godown Storage and Container demurrage charges. By a consent recorded in court on 8/3/2017, there was entered a judgment for the plaintiff in the sum of USD 104,160 and the parties left it to court and the court awarded interests on that sum. That consent judgment being intact in the court file and the plaintiff having informed the court that it abandoned the balance of the demurrage charges after the shipping line had agreed to waive the same, the claim regarding demurrage charges is not available for determination by the court at all.

27. On storage charges, the defendant has submitted that the evidence led is on handling charges rather than storage and further that the court should decide this case on the basis of public interest that the interest of the Defendant as a public body should be elevated beyond that of the plaintiff and individual corporate.

28. I have looked at the documents filed and respecting the sum of Kshs.5,936,880/=. They are to be found at pages 9,10 & 11 of the plaintiffs list of documents and also at 26 of the defendants list of document. The debit note is irrefutably in respect of storage. When the debit note is related to the receipts issued all showing the reference number as KM82, which the reference number is assigned to the plaintiffs account in the debit note, no doubt is left as to what payment was being effected. It was clearly in settlement of the debit note on account of storage charges. I have not seen any basis, by way of any documents that the plaintiff was obligated to the said Habo Agencies Ltd for payment of any handling charges.

29. More importantly parties to a civil litigation are bound by their pleadings hence a party is not entitled to depart, whether by pleadings or submissions, from what it stated on the pleading. Infact evidence is only led to prove the assertions in the pleadings and not otherwise. I have read the statement of

defence on record and on it there is no allegation that the sum claimed is for handling rather than storage charges.

30. Instead the defendant was very affirmative that it did comply with the court order in the JR No. 647/2003 in full and nothing was pending on account of that order only to file a witness statement and offer submissions to the effect that the storage and demurrage charges were not paid by it but the plaintiff should have mitigated its losses by paying its self-assessed duty.

31. On public interest considerations, this court proceeds from the stand point that the rule of law and obedience to court orders is the very fulcrum of democracy without which a civilized and legitimate judicial system cannot operate. We have here an order directing the defendant to bear the storage and demurrage charges issued on 15/12/2003 which the defendant has not complied with some 14 years later. Yet, the defendant is a public organ obligated by the constitutional dictates to adhere to some value system and principles including the rule of law, human rights and expeditious discharge of public duty. To this court public interest rests more heavily toward the need to obeying the law and upholding the rights and fundamental freedoms of the individual.

32. It is not that a person seeking to protect his rights to property should be faulted and penalized for doing so through the constitutionally sanctioned process. I hold that to deny the plaintiffs payers on the alleged grounds that it ought to have paid the duty, it was not obligated to pay, as a way of mitigating own losses, would be to push the duty to mitigate losses to a level that encourages a public body, like the defendant, to trample upon people's rights with the expectation that the victim has no otherwise but to pay an unlawful tax. That would be in total negation of the right to access justice and to fair administrative action. The court in that event would be deconstructing the constitutional gains and benefits Kenyans have bestowed unto themselves.

33. However, in this matter the plaintiff cannot be said to have failed to mitigate own losses. The fact that it moved with alacrity and paid the storage and demurrage charges when it was a duty imposed on the defendant by the court is itself an act in mitigation of own losses. One would imagine what damages one would be seeking today if the plaintiff was to play along with the dithering by the defendant on payment of these charges. The cargo being human food might have become unfit for human consumption these many years down the line. The value thereof would as well have been a part of this claim. That has been mitigated by the plaintiff.

34. The upshot is that, I find that the plaintiff has proved his case to the requisite standards in that it incurred storage charges and was billed in the sum of Kshs.5,936,880/= of which it has since paid the sum of Kshs.5,523,631/= leaving a balance of Kshs.413,149/= unpaid.

35. There was no evidence that the unpaid sum of Kshs.413,149/= had ever been demanded by Habo Agencies Ltd even by the time the plaintiff testified. One can only assume that it was abandoned and if not abandoned, it has become irrecoverable from the plaintiff by operation of law under the limitation of Actions Act.

36. I therefore enter an additional judgment for the plaintiff against the defendant in the sum of Kshs.5,523,731 being the sum proved to have been paid by the plaintiff be Habo Agencies Ltd. That sum and the sum of USD 104,160 on which Judgment was entered by consent shall attract interest at the rate of 14% p.a from 1/3/2004 and 1/5/2004 respectively till payment in full. I have fixed the commencement dates for interest because I have noted from the documents at page 2 of the plaintiffs documents that payments were made and concluded by the 20/4/2004 while the receipts at page 9,10 & 11 were made on the 20/2/2004.

37. I also award the costs of the suit to the plaintiff to be paid by the defendant.

Dated and delivered at Mombasa this 31st day of January 2018.

P.J.O. OTIENO

JUDGE