



REPUBLIC OF KENYA



**Kenafri Industries Ltd v Kibinge & 3 others (Civil Suit 263 of 2015)
[2023] KEHC 2389 (KLR) (Commercial and Tax) (24 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2389 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT 263 OF 2015
A MABEYA, J
MARCH 24, 2023**

BETWEEN

KENAFRIC INDUSTRIES LTD PLAINTIFF

AND

FRANCIS MACHARIA KIBINGE 1ST DEFENDANT

CATHERINE NJERI 2ND DEFENDANT

NJEMACS ENTERPRISES 3RD DEFENDANT

NJEMACS ENTERPRISES LTD 4TH DEFENDANT

JUDGMENT

1. The plaintiff is a limited liability company incorporated in Kenya and is a manufacturer of various industrial products at its factory located in Baba Dogo in Nairobi.
2. The 1st and 2nd defendants were the registered proprietors of the 3rd defendant which was deregistered and incorporated into the 4th defendant company. The 1st and 2nd defendant are its sole directors.
3. Vide an amended plaint dated July 7, 2015, the plaintiff alleged that the 1st and 2nd defendant, trading as the 3rd defendant, entered into a distributorship agreement with the plaintiff for which they collected various goods from the plaintiff on credit. That they continued to do so even after the 3rd defendant was incorporated to the 4th defendant company.
4. That the 1st defendant, as a representative of the 3rd defendant and director of the 4th defendant, entered into a distributorship agreement with the plaintiff representing that he was a director of the 4th defendant.



5. The plaintiff contended that the change of particulars of the 3rd and 4th defendants was deliberately executed by the 1st and 2nd defendant with the sole intention of defrauding the plaintiff and that the 4th defendant's corporate veil ought to be lifted to establish the fraud perpetuated by the defendants jointly and severally.
6. The plaintiff set out the particulars of fraud committed by the defendants which included continuing to trade in the name of the 3rd defendant whereas it had been deregistered and replaced by the 4th defendant company; entering into an agreement with the plaintiff as "Njemacs Ltd" whereas the plaintiffs knew that the correct name of the entity was "Njemacs Enterprises" or "Njemacs Enterprises Ltd".
7. Further, the plaintiff claimed that the defendants wrongly and fraudulently procured the plaintiff's invoicing clerk to alter the invoices of the amount owing to the plaintiff by under invoicing and cancelling the invoices before payment.
8. It further claimed that, as a consequence of the defendants' said fraudulent conduct, the plaintiff's documents were altered to reflect credit to the defendants in the sum of Kshs 44,755,143/- which it claimed from the defendants.
9. In the premises, the plaintiff prayed for judgment against the defendants, jointly and severally, for the sum Kshs 44,755,143/-, costs of the suit and interest.
10. In opposition to the suit, the 1st, 2nd and 3rd defendants (the defendants) filed an amended statement of defence dated August 31, 2015.
11. The defendants denied that they had entered into an agreement with the plaintiffs. The 2nd defendant denied that she traded in the name of the 3rd defendant or that she registered a business under the 3rd defendant name. She contended that she never entered into any distributorship agreement with the plaintiff.
12. The defendants denied the fraud allegations in toto and its particulars. They further denied that the plaintiff supplied and/or delivered to them any goods valued at Kshs 44,755,143/- during the period between August 14, 2013 and November 11, 2014 as alleged in the amended plaint.
13. Without prejudice to the foregoing, the 1st and 3rd defendant asserted that they fully paid the purchase price to the plaintiff for all the goods supplied by the plaintiff. They therefore denied that the plaintiff was entitled to the alleged sum of Kshs 44,755,143/- as claimed.
14. The 4th defendant also filed an amended statement of defence dated August 22, 2015. Its contents were largely similar to those in the 1st, 2nd and 3rd defendant's amended statement of defence.
15. It denied the particulars of fraud as set out in the amended plaint. It contended that on the date the alleged agreement was entered into, the 4th defendant had not been incorporated and therefore it could not have entered into the agreement. Further that the plaintiff never supplied it with any goods and that it has never ordered and/or collected any goods from the plaintiff's premises in Baba Dogo Nairobi.
16. Both the plaintiff and defendants relied on one witness each.
17. PW1 was Benjamin Migan, who swore a witness statement dated April 14, 2016 and a further witness statement dated September 15, 2016. He was an internal auditor employed by the plaintiff.
18. He testified that the 1st defendant first came to the plaintiff and stated that his business was Njemacs Enterprises. That the business was later incorporated to Njemacs Ltd, the 4th defendant, which



- signed the distributorship agreement with the plaintiff. That he variously represented his business as “Njemacs Ltd”, “Njemacs Enterprises” and “Njemacs Enterprises Ltd”.
19. That the 1st defendant did not present the company particulars to the plaintiffs even after its incorporation in 2014. That the plaintiffs’ claim against the defendants arose out of deliveries made to the defendants which were not paid for and the account of the defendants reflected fluctuating outstanding balances.
 20. That the defendants in collaboration with the plaintiff’s invoicing clerk, one Mr Jim Othino committed fraud through alteration of the selling prices of products and producing false credit notes.
 21. That the defendants, through the 2nd defendant, issued two cheques in an attempt to settle the debt but they were returned unpaid with the remarks “refer to drawer”. The 1st and 2nd defendant continued to issue cheques in the business name even after it had been changed to “Njemacs Enterprises Limited” which was an act in furtherance of the fraudulent activities of the defendants.
 22. His further testimony was that at the time the distributorship agreement was entered into, the defendants had formed the 4th defendant company and the plaintiff continued to supply them with products. That since the defendants had their own transport arrangements, the plaintiff would issue an invoice and a delivery note to their driver at the time of collecting the goods. That in the circumstances, the amount outstanding in the account was due.
 23. DW1 was the 1st defendant who testified on his own and on behalf of the defendants. He adopted his witness statements dated September 5, 2016 and October 4, 2016, respectively as his evidence in chief.
 24. He told the court that he did not collude with the plaintiff’s employees as alleged by the plaintiff. That the goods that the plaintiff was claiming the alleged outstanding sum was never delivered to him.
 25. In cross-examination, he testified that he began dealing with the plaintiff in 2010 when there was no formal agreement between them and they were trading under the name “Njemacs Enterprises”. That in or about 2014, they entered into a written agreement. He admitted that the returned cheques have never been replaced.
 26. In re-examination, he stated that the defendants did not order for the goods in the invoice on page 14 of PExh.1 nor were they supplied. That the delivery notes were not signed by them nor their servants. That he did not apply for any credit memos nor sign for them. That he instructed the bank not to clear the cheques when he discovered discrepancies in the account.
 27. Having considered the entire record and submissions, the first issue for determination is whether there was a distributorship agreement between the plaintiff and the defendants.
 28. The plaintiff submitted that the 4th defendant and the plaintiff entered into a distributorship agreement signed by the 1st defendant. On the other hand, the defendants submitted that the said agreement was entered into between the 1st defendant trading as Njemacs Enterprise and the plaintiff. That no agreement was entered into between the plaintiff and the 2nd defendant nor between the plaintiff and the 4th defendant.
 29. The distributorship agreement is annexed at pages 1 to 13 to the plaintiff’s documents dated May 29, 2015 which were produced as PExh.1. The agreement was entered into by the plaintiff and ‘Njemacs Ltd’ on July 1, 2013 and the 1st defendant signed it on its behalf. Through the agreement, the plaintiff appointed Njemacs Ltd as its distributor for its products.
 30. A certificate of registration of Njemacs Enterprise as a business name is found on page 1 of the defendant’s list of documents dated September 5, 2016. The 1st defendant is named as its proprietor.



31. On page 3 thereof, Njemacs Enterprises Ltd was incorporated as evidenced by the certificate of incorporation found therein. It is dated April 22, 2014.
32. I have looked at the emails found in the plaintiff's further list of documents dated September 15, 2016. From the said documents, it is clear that the 1st defendant, through the 3rd defendant was carrying on a distributorship business with the plaintiff before a formal agreement was entered into and before the incorporation of the 4th defendant company.
33. Although the agreement was entered into before the 4th defendant was incorporated, it is evident that the 1st defendant was behind both the 3rd defendant business and the 4th defendant company. In this regard, I find that there was indeed a binding distributorship agreement between the plaintiff and the defendants.
34. The second issue for determination is whether the plaintiff has demonstrated that the defendant obtained goods worth Kshs 44,529,753.28 which remains unpaid for.
35. It was the submission of the plaintiff that its evidence and the documents it presented demonstrated that there was a manipulation of records which made the defendant illegally benefit with goods worth Kshs 44,755,143/-.
36. Conversely the defendants argued that the plaintiff did not prove on a balance of probability that the defendants were involved in the alleged fraudulent acts of the plaintiff's employee and that the defendant did not benefit from the alleged fraudulent acts as the goods in issue were never delivered to them.
37. Pages 14-38 of the PExh.1 are domestic invoices from the plaintiff and a duplicate copy for each invoice bearing a different amount due despite the fact that the goods ordered were similar in quantity and description.
38. For instance, at page 24 there is an invoice from the plaintiff to the defendant titled invoice number 90006287, delivery note number 8xxxx07 for Kshs 2,706,990/-. This is followed at page 25 with a similar invoice, number 9xxxx3 and a similar delivery note number 8xxxx7 with the same goods of the same quantity as the one on page 24. The only difference is that, the invoice at page 25 was for a meagre sum of Kshs 165/-.
39. The documents produced include delivery notes and delivery details bearing the signature of what the plaintiff told the court was the defendants' representatives indicating that the goods were indeed delivered to and received by them.
40. The plaintiff filed the customer carry forward statement in its further list of documents dated April 14, 2016. The discrepancies in the faulty invoices are reflected in the said statements. The defendants did not adequately controvert or challenge the said statement particularly in light of the glaring discrepancies in the invoices.
41. The plaintiff's evidence was crystal clear, the defendants had infiltrated the plaintiff's sales department of one of its employees and influenced him to commit the fraud complained of. The impugned invoices were produced by the plaintiff. The defendants did not provide an alternative statement to challenge the entries in the said statement.
42. In view of the foregoing, this court holds that the plaintiff was able to prove its case to the required standard.



43. The upshot is that, the parties entered into a distributorship agreement which the defendants have failed to honour. They remain indebted and have acknowledged such a debt as seen by the issuance of cheques that were not honoured. There was no explanation that was given for issuing the cheques that were subsequently dishonoured.
44. Accordingly, the plaintiff's case is meritorious and the same hereby succeeds. Judgment is entered for the plaintiff against the defendant in terms of prayers (a), (b) and (c) of the amended plaint dated July 7, 2015.

It is so decreed.

DATED and **DELIVERED** at Nairobi this 24th day of March, 2023.

A. MABEYA, FCIArb

JUDGE

3

