



REPUBLIC OF KENYA



KENYA LAW
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**Apt Commodities Limited v Nic Bank Limited (Civil Suit 63 of 2018)
[2023] KEHC 27556 (KLR) (24 November 2023) (Judgment)**

Neutral citation: [2023] KEHC 27556 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT 63 OF 2018
F WANGARI, J
NOVEMBER 24, 2023**

BETWEEN

APT COMMODITIES LIMITED PLAINTIFF

AND

NIC BANK LIMITED DEFENDANT

JUDGMENT

1. In the Plaint dated 9th July 2018, the Plaintiff pleaded among others that:
 - i. On or about 5th February 2015, the Defendant extended to the Plaintiff a facility to enable the Plaintiff to purchase tea and export it for sale in Egypt.
 - ii. The Plaintiff consequently bought a consignment of tea for USD 659,230 and exported to Egypt around August 2015 but the intended buyer, El Manar Co. delayed in collecting the goods forcing the Plaintiff to source an alternative buyer, Fayed Customs Office.
 - iii. Indeed, the Plaintiff acquired an alternative buyer and had to change the documentation including invoices to reflect the name of the new buyer.
 - iv. The Plaintiff then requested the Defendant to amend the necessary documents to reflect the name of the new buyer but the Defendant delayed in doing so for a period of 8 months leading to the impounding and selling of the goods by the Egyptian Officials.
 - v. The Defendant was negligent in not acting in time to facilitate sale of the goods to the new buyer.
 - vi. The Plaintiff further states that the neglect on the part of the Defendant also amounted to breach of contract and fiduciary duty to the Plaintiff.
 - vii. That the Defendant also decline to restructure the facility in line with the change in circumstances impeding the new buyer and which resulted to the loss incurred by the Plaintiff.



2. The Plaintiff therefore prayed for reliefs as follows:
 - a. Loss of the goods sold Kshs. 32,132,150.86
Storage Kshs. 3,568,391.66
Interest Kshs. 9,817,752.18
Non-service Orders Kshs. 1,002,046.89
Penalties Kshs. 530,223.09
Total Kshs. 109,708,111.93
 - b. General Damages
 - c. Cost
 - d. Interest at court rates.
3. The Defendant filed its Statement of Defence dated 3rd April 2019 in which it averred inter alia:
 - a. That the 1st Defendant had no fiduciary or contractual duty to amend the documents demanded by the Plaintiff.
 - b. The Defendant yet amended the documents within a reasonable period.
 - c. The Defendant cannot challenge the Defendant's statutory power of sale over the security received.

Evidence

4. At the hearing, both parties adopted and relied on their witness statements and Bundle of Documents without viva voce evidence.
5. I have considered the submissions filed by the parties and the authorities relied upon.
6. The Plaintiff reiterated the averments in its pleadings and submitted that the Defendant had breached contract and fiduciary duty it owed to the Plaintiff.
7. It was also submitted that the Defendant was guilty of negligence for refusal to amend and change the documentation following the change of buyer. The Plaintiff prayed the court to apply law to find relief for the loss it incurred.
8. The Defendant also filed its submissions dated 21st July 2023. It was submitted that the Defendant owed no fiduciary duty to the Plaintiff because the relationship did not go beyond that of an ordinary lender and borrower. Counsel relied on the case of Sunil Chandlal Shah & 3 others v I&M Bank (2018) eKLR and Faraj Abdallah Idha t/a Safif Trading v Gulf Bank Limited (2021) eKLR.
9. The Defendant also reiterated their Defence and submitted that they had no duty to assist the Plaintiff to clear the facility and there was a duty under clause 4.2.1 of the Officer Letter on the part of the Plaintiff to repay the facility.
10. It was further submitted that the request for the change of documents was an attempt to vary the contract and was based on a voluntary indulgence on the part of the Defendant which the Plaintiff cannot rely on the assert as right based on the alleged delay to change the documents. Counsel relied on the case of Toyota Kenya Ltd v Vehicle & Equipment Leasing Ltd (2021) eKLR.



11. It was thus submitted that the Defendant was not liable for the Plaintiff's loss and so the Plaintiff was not entitled to the reliefs sought.

Analysis

12. The Court has reviewed and considered the pleadings, testimonies and evidence produced by parties together with the submissions and authorities in support and opposition to their respective cases.
13. analysis ssThe main issue for determination in this case is whether the Defendant breached the contract as to entitle the Plaintiff to the damages pleaded in the Plaintiff.
14. In this case, the Plaintiff's case is that after the intended buyer failed to buy the goods, the Plaintiff found an alternative buyer but the Defendant delayed in changing the documentation to reflect the alternative buyer hence the loss.
15. On the part of the 1st Defendant, its case is that it had no contractual duty, duty of care or fiduciary duty to change the documentation to reflect the new buyer in any event proceeded to act within a reasonable time and changed the documentation as requested by the Plaintiff.
16. I have perused the Letter of Offer executed on 5th February 2015 and note that the overdraft facility was for normal working capital and was to facilitate purchase of teas against presentation of conformed orders and the bank would finance up to 90% of the face values. It would thus appear that the bank had no role in interventions following the frustrations between the Plaintiff and intended buyers.
17. I note from the materials availed in court that it is not apparent whether it is the Egyptian Authorities who moved with unwarranted speed to dispose of the Plaintiff's Black Tea consignment or whether the delay by the Defendant for about either months was unreasonable occasioning the loss.
18. It would also appear from the pleadings and evidence produced in this court that the initial intended buyer was El Manar Co. and the circumstances leading to the failure of the sale to the said company are not apparent.
19. It is also not shown whether the failure by El Manar Co to accept the consignment of the Plaintiff's black tea was breach of contract. I say so because the Defendant was not a party to the contract. It only came in as a financier. This being a contract of sale, Section 6 of the *Sale of Goods Act* is relevant. It states that:

“Subject to the provisions of this Act and of any Act in that behalf, a contract of sale may be made in writing (either with or without seal) or by word of mouth, or partly in writing and partly by word of mouth, or may be implied from the conduct of the parties:

Provided that nothing in this section shall affect the law relating to corporations.”

20. Therefore, there ought to have been a contract between the Plaintiff and El Manar Co. The Law on Sale of Goods was aptly captured by Onguto J. in the case of Isaac Mugweru Kiraba T/A Isamu Refri-electricals –versus- Net Plan East Africa Limited [2018] eKLR as follows; -

...the Plaintiff's obligation, once a contract is proven, was to deliver the goods and transfer the property in them. The Defendant on the other hand had the obligation to accept the goods and pay the price in exchange of the property granted.

In my judgment an action for the price of goods sold and delivered is what is left for any seller of goods once the property in the goods has been transferred to a buyer. Consequently, such an action, as in the instant case, implies that property has already passed and the seller who claims ought to succeed if he



proves delivery at an agreed or reasonable price and no known defence is set up by the buyer. As was stated in the case of *Ex parte Gordon* [1808] 15 Vs 286, the price is to be claimed after the period due for payment has lapsed and not earlier. Then, the buyer is specifically bound to perform his part of the bargain by paying for the goods.”

21. Similarly, in the case of *Societe Miniere Delest v Afrika Invest Limited & 2 others* [2015] eKLR:

“The contract of Sale (the first contract) is clearly between the plaintiff (*Societe Miniere Delest*), and the first defendant (*Africa Invest Limited*) to the exclusion of all other parties. That contract was signed on behalf of the seller by one *Ali Rashid Birindwa* while one *Emmanuel Mutaharugamba* signed on behalf of *Africa Invest limited* (the buyer). The shipping contract on the other hand is between the third defendant and *Marua Group Limited of Kampala Uganda*, and was signed by the same *Ali Rashid Birindwa* and another person. That contract is in the form of the Bill of Lading. In addition to its other legal attributes already referred to above, according to “*LEXIS NAVIGATOR DICTIONARY*”

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“A Bill of Lading is a receipt signed by the person or his agent who contracts to carry certain specific goods, and setting out the terms of the contract of carriage under which the goods have been delivered to and received by the ship.

The signed Bill of Lading is handed over to the shipper, who may either hold on to it or transfer it to a third person. During the voyage and transit, the Bill of Lading under the law merchant is considered the symbol of the goods described in it, and the endorsement and delivery of the Bill of Lading operates as a symbolic delivery of the goods. This person may be named in the Bill of Lading as the person to whom the delivery of the goods is to be made on arrival at the destination, in which case he is known as the consignee; if he is not named in the Bill of Lading, he is usually known as the holder or endorsee of the Bill of Lading.

The holder of the Bill of Lading is entitled as against the shipper to have the goods delivered to him to the exclusion of other persons. It is thus in the same position as if the goods were delivered to him or in his physical possession, subject to the qualification that he takes the risk of non-delivery of the goods by the ship owner, and that, in order to obtain actual delivery of the goods from the ship owner, he may be obliged to discharge the ship owner’s lien for freight. A Bill of Lading issued by the ship owner’s agent in the absence of any contract of carriage is a nullity.”

Halsbury’s Laws of England Volume 7 paragraph 314, says

inter alia:-

“...although a bill of lading has often been described as a negotiable instrument, it is not in the strict sense of the words. The principal points of resemblance of a bill of lading to a negotiable instrument are that:-

the right to demand delivery of the goods from the carrier is transferred by the delivery to the lawful holder of the Bill of Lading, no distinct contract of assignment and no notice to the carrier being necessary for the transfer to take effect;

in some cases, the transferee may acquire, by virtue of the transfer, rights over the goods which are greater than those of the transferor;

the transferee of the bill may in certain cases sue and be sued on the contract contained in the Bill of Lading;



the transferee, even if his title is defective may give a good discharge to the carrier who delivers the goods to him, and

the consideration provide by the transferee may be a past consideration.”

22. Turning to the role of the Defendant in this transaction, the Defendant’s case is that though it had no obligation to amend the documentation, it did so within a reasonable time. There is no dispute that the delay took about 8 months. However, the Plaintiff was under duty to present evidence and material to proof that there was any shorter period within which the Defendant ought to have acted to subvert the imminent loss.

23. The Plaintiff failed to suggest any shorter time of action. This court is takes judicial notice that the transaction was international in nature within states geographically separated by substantive distance and action would not be anticipated to be prompt. A reasonable time therefore ought to have been pleaded and proved. This duty was on the Plaintiff.

24. In *Anne Wambui Ndiritu –vs- Joseph Kiprono Ropkoi & Another* [2005] 1 EA 334, the Court of Appeal held that:

“As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act.”

25. Further, in *Evans Nyakwana v Cleophas Bwana Ongaro* [2015] eKLR it was held that:

“As a general preposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107 (i) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore, the evidential burden... is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as Section 108 of the *Evidence Act* provides the burden lies in that person who would fail if no evidence at all were given as either side.”

26. I am thus unable to discern from the facts and evidence in court how the Defendant’s delay of 8 months led to the loss by the Plaintiff. As stated elsewhere in this judgment, the court was also not told why the intended buyer declined the consignment of the tea after the Plaintiff delivered it and the consequences that would legally ensue. The prayer for the recovery of loss of goods of Kshs. 32,132,150.86 thus fails.

27. On the existence of the fiduciary duty between the Defendant Bank, it is settled that the duty is not primarily fiduciary as in the case of trustee and beneficiary. See *Faraj Abdalla Idha t/a Sariff Trading v Gulf African Bank Limited* (2021) eKLR and I am similarly fortified by the reasoning in the case of *Sunil Chandulal Shah & 3 others v I & M Bank* [2018] eKLR, where the Court stated as follows:

“Underscored in this opinion, and which cannot be begrudged, is that where a Lender relates with the Borrower more intimately than the everyday Lender, then the Lender risks assuming the higher duty of a Fiduciary.”



28. There is no evidence that the relationship between the Plaintiff and the Defendant was such that it would be elevated to suit a fiduciary obligation on the part of the Defendant in the dealing on the contract. I am thus unable to find how the Defendant would have breached the fiduciary duty it did not owe to the Plaintiff.
29. The Plaintiff also prayed for interest, storage charges, nonservice orders and penalties. I agree with the Defendant's submission that this constituted special damages which must be pleaded and proved.
30. Courts have stated times without number that special damages must not only be pleaded but also strictly proved. In the case of *Kenya Women Microfinance Ltd v Martha Wangari Kamau* [2021] eKLR the Court stated as follows:

A claim for special damages is in the nature of restitution and, where proved, it is meant to restore the claimant to the position he would have been save for the action complained of. The documents the respondent placed before the trial court did not show what, if anything, the businesses used to earn or bring and, as a result of the appellant's actions, she lost that income which the trial court was to restore her to.

The respondent's evidence was in general terms without any specificity on the losses. For instance, she did not explain why the amount in her particulars of special damages was more than what she prayed for in the reliefs. She did not demonstrate through evidence that she was unable to access a loan from Faulu Bank. Similarly, she did not tender documentary evidence to show how much the curio and transport businesses were generating, if any, or that that her shares were frozen.

What the respondent did, was to put forward documents without demonstrating to the court what they stood to prove and how. This was a clear case of the respondent throwing documents at the court on the loss she thought she had suffered and expected the court award her damages. This did not discharge the legal burden of proof placed on her to strictly prove her special damages claim. The many documents she placed before court not even referred to in evidence to assist the court on how they proved the particulars of special damages.

31. Addressing the same, the Court of Appeal stated in *Capital Fish Limited v Kenya Power and Lighting Company Limited* (2016) eKLR stated as follows:

“The Appellant apart from listing the alleged loss and damage, it did not lead any evidence at all in support of the alleged loss and damage. As it were, the appellant merely threw figures at the trial court without any credible evidence in support thereof and expected the court to award them. Indeed, there was not credible documentary evidence in support of the alleged special damages.”

32. Moreover, in *David Bagine v Martin Bundi* [1997] eKLR, the Court of Appeal cited the judgment by Lord Goddard CJ. in *Bonham Carter v Hyde Park Hotel Limited* (1948) 64 TLR 177, where he stated that:

“[The] Plaintiffs must understand that if they bring actions for damages it is for them to prove damage. It is not enough to note down the particulars and, so to speak, throw them at the head of the court saying ‘this is what I have lost’, I ask you to give me these damages; they have to prove it.



in Attorney General of Jamaica v Clerke (Tanya) (nee Tyrell), Cooke, J.A. delivering the judgment of the court stated that special damages must be strictly proved; the court should be very wary to relax this principle; that what amounts to strict proof is to be determined by the court in the particular circumstance of the case and the court may consider the concept of reasonableness.”

33. I have said enough to show that it is settled law that special damages must be pleaded and strictly proved. I note that the Plaintiff well particularized the special damages in paragraph 13 of the Amended Plaintiff. The circumstances under which the said expenses arose were however not pleaded.

34. Further, no evidence was tendered in Court to support the special damages as particularized. I therefore find no basis for to award special damages. The Plaintiff also pleaded General Damages. Such Damages are ones that would restore the Plaintiff to the position of the breach had not occurred would suffice.

35. As was stated in Consolata Anyango Ouma v South Nyanza Sugar Company Limited MGR HCCA No. 53 of 2015 [2015] eKLR as follows:

“The next question is whether the appellant was entitled to damages as a result of the breach. As a general principle, the purpose of damages for breach of contract is, subject to mitigation of loss, the claimant is to be put as far as possible in the same position he would have been if the breach complained of had not occurred. This principle is encapsulated in the Latin phrase restitution in integrum (see Kenya Industrial Estates Ltd v Lee Enterprises Ltd NRB CA Civil Appeal No. 54 of 2004 [2009] eKLR, Kenya Breweries Ltd v Natex Distributors Ltd Milimani HCCC No. 704 of 2000 [2004] eKLR). The measure of damages is in accordance with the rule established in the case of Hadley v Baxendale (1854) 9. Exch. 341 that the measure of damages is such as may be fairly and reasonably be considered arising naturally from the breach itself or such as may be reasonably contemplated by the parties at the time the contract was made and a probable result of such breach (see Standard Chartered Bank Limited v Intercom Services Ltd & Others NRB CA Civil Appeal No. 37 of 2003 [2004] eKLR). Such damages are not damages at large or general damages but are in the nature of special damages and they must be pleaded and proved (see Coast Bus Service Ltd v Sisco Murunga Ndanyi & 2 others, NRB CA Civil Appeal No. 192 of 92 (UR) and Charles C. Sande v Kenya Co-operative Creameries Ltd, NRB CA Civil Appeal No. 154 of 1992 (UR).”

36. Having found no breach of contract, the prayer for general damages fails. The inescapable finding is that the suit is without merit and is for dismissal.

Determination

37. The upshot of the foregoing is the Plaintiffs suit is dismissed with costs.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 24TH DAY OF NOVEMBER, 2023.

F. WANGARI

JUDGE

In the presence of:

Okello Advocate for the Plaintiff

M/S Cheruiyot Advocate h/b for Kongere Advocate for the Defendant



Barile, Court Assistant

