REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCC NO. 86 OF 2019

PANALPINA AIRFLO B.V.....PLAINTIFF

-VERSUS-

PJ DAVE FLORA LIMITED.....DEFENDANT

JUDGMENT

1. Through the plaint filed on 26th February 2019 plaintiff herein, **PANALPINA AIRFLO B.V.,** sued the Defendant, **PJ DAVE FLORA LIMITED** seeking orders for the payment of USD 341, 907 on account of freight forwarding services allegedly rendered to the defendant between the years 2017 and 2018. The plaintiff also sought the costs of the suit together with interest.

2. The plaintiff's case is that it entered into written agreements with the defendant, through various House Airway Bills, to transport the defendant's fresh flower consignments from Kenya to Amsterdam. It states that it issued the House Airway Bills in which the plaintiff and defendant were described as carrier and shipper respectively, on the receipt of each consignment of flowers. The plaintiff avers that the express terms of the various contracts were, inter alia, that:

a) The carriage was subject to the Montreal Convention or the Warsaw Convention.

b) The shipper guaranteed payment of all charges for the carriage due in accordance with the Carrier's tariff and conditions of carriage.

c) No agent, employee or representative of the Carrier had authority to alter, modify or waive any provisions of the contract.

3. The plaintiff contends that the defendant did not deny that it provided the freight services as agreed but claims that in breach of the terms of their agreement, the defendant deducted USD 203,328.84 from the amount of money due to the plaintiff for the its services.

4. The defendant states that their agreement required it to provide weekly forecast of the volume of the cargo to be transported while the plaintiff would undertake to secure freight capacity so as to have the defendant's consignments delivered to their destination within the agreed time frames.

5. Through the statement of defence filed on 8th April 2019, defendant admits that it contracted the plaintiff's services as a freight forwarder but maintains that it duly paid all charges owed to the plaintiff after offsetting the financial loss it suffered following the plaintiff's breach of the agreement. It further concedes that the plaintiff arranged for the storage and transportation of its flower consignments to various destinations between 3rd September 2017 and 31st July 2018, but claims that the plaintiff breached the agreed terms of their agreement by delivering the flowers outside the agreed timelines and by causing damage to the flowers due to poor storage.

6. The defendant listed the particulars of breach as follows: -

a) Failing to make adequate arrangements for the defendant's consignment to be airlifted within the agreed timelines thereby causing the defendant to lose the premium market prices over the valentine season, this being the defendant's peak sales period.

b) Late delivery of the defendant's consignments way outside the agreed timelines and the peak sale season.

c) Failing to provide sufficient cold rooms for the storage of the defendant's consignment.

d) Delay in off-loading the flowers from the defendant's trucks to cold rooms thereby affecting the quality of the flowers and the

eventual selling price.

7. The defendant further contends that as a result of the said breaches, it suffered substantial financial loss due to price differential that eventually obtained. It estimated the loss suffered at USD 203,328.84. It was the defendant's case that as a result of the loss it paid USD 101,574.47 to the plaintiff on 26th July 2018 and offset its loss of USD 203,328.84 thereby wholly settling the sums due to each party. The defendant adds that following the set off, it does not owe the plaintiff any money as alleged.

8. The defendant denies that the plaintiff transported the various consignments of its goods and reiterates that the plaintiff was at all material times a freight forwarder whose obligation, under the agreement, was to arrange for the transportation of the defendant's flower consignments.

The Plaintiff's Case/Oral Evidence

9. The plaintiff's sole witness, **Mr. Conrad James Archer**, adopted his witness statement dated 10th January 2019 as his evidence in chief. On cross examination, he testified that he worked as the plaintiff's Managing Director from the year 2011 until March 2018 during which period, the plaintiff had dealings with the defendant relating to the transportation of flowers to international markets.

10. He stated that the plaintiff does not own any aircrafts but is a freight forwarder got contracts as a carrier for the transportation or carriage of flowers and would, in turn, contract carriers to ferry the flowers on their behalf.

The Defendant's Case

11. The defendant's witness **Mr. Santosh Mahonar Kulkarni** confirmed the existence of a contractual relationship between the plaintiff and the defendant. He testified that the Defendant is a floriculture company specializing in the growing and exporting of premium quality fresh cut flowers to the international market and that it has, over the years, built a reputation as one of the best red roses exporter in the market. He stated that the roses are sold in one of the biggest auction sales in Netherlands, known as the Dutch Auction.

12. He confirmed that the defendant contracted the Plaintiff, as a freight forwarder, to arrange with carriers to facilitate the transportation of its consignments to various international destinations. He added that at all material times, the Plaintiff acted as the Defendant's agent in making arrangements with carriers for pick-up and lifting of the consignments from Kenya to the international markets.

13. He zeroed in on the consignment giving rise to the instant dispute which was the 2018 Valentines Day flowers consignment and emphasized the importance of the Valentine season to the Defendant's business while stating that it accounted for almost 40% of the Defendant's revenue for the year. He explained that once the flowers are transported to the various destinations, they are sold at an auction to various retailers in the respective countries.

14. He emphasized that for the flowers to fetch the best market prices during the Valentine season auction, it was critical for the last consignment to reach Amsterdam by 9th February 2018 so as to ensure that all the flowers were offloaded and distributed for sale to various retailers by 10th February 2018. He further explained that it would be pointless for the flowers to reach the respective markets between 11th to 14th February or even after the Valentine season as by this time most retailers would have already bought all the flowers that the require ahead of the Valentine Day and that the flowers would therefore fetch nominal prices.

15. He testified that in readiness for the 2018 valentine season, the Defendant, by a letter dated 18th January 2018, contracted the Plaintiff to facilitate the delivery of the flowers to Amsterdam in readiness for the Valentine season. He stated that the Plaintiff confirmed to the Defendant that it had undertaken the requisite arrangements to handle the Defendant's consignment ahead of the Valentine peak season and that it had adequate capacity to undertake the consignments.

16. He added that pursuant to the plaintiff's undertaking, the defendant provided a forecast of the volume of the cargo it intended to deliver and that the Plaintiff, via email, confirmed the same without any reservations. He added that despite the above arrangements, the Plaintiff did not deliver the entire consignment within the Valentine's season and further, that some of the flowers were poorly handled in breach of the agreement between the parties.

17. He reiterated that as a result of the Plaintiff's breach of the agreed delivery timelines and the mishandling of the consignment, the Defendant suffered substantial financial loss due to the price differential eventually obtained from the auction sale. He stated that the total loss suffered by the Defendant amounted to Euro 165,308.00 (equivalent to USD 203,328.84 at an exchange rate of 1.23 prevailing at the time. He added that the Defendant recovered the said loss by offsetting against the Plaintiff's dues. He further stated that the Defendant thereafter paid to the Plaintiff the final balance sum of USD 101,574.47 and concluded the defendant did not owe the plaintiff any money as alleged.

Submissions

18. Parties canvassed their respective cases by way of written submissions which their advocates subsequently highlighted orally. **Mr. Kahura**, learned counsel for the plaintiff, plaintiff submitted that whereas plaintiff was not the actual carrier for the flowers, it was the contractual carrier according to the description in the freight industry. It was submitted that the above distinction is reflected in **Article 39 of the Montreal convention**. The counsel submitted that its contract with the defendant was governed by the **Carriage by Air Act** (hereinafter **"the Act"**) and the **Montreal Convention** (hereinafter **"the Convention"**) which provides for all international carriage of persons, baggage or cargo performed by an aircraft or cargo. It was submitted that the **Convention** applies to international carriage where the place of departure and destination are in different countries.

19. Counsel argued that the plaintiff was a contracting carrier of the defendants flowers and observed that the Convention distinguishes between the actual carrier of the goods and the contracting carrier. It was submitted that contrary to the defendant's claim that the plaintiff was its agent, the Airway Bills signed by the parties described the plaintiff as the issuing carrier's agent which meant that their agreement was governed by the Act and the Convention.

20. Counsel referred to the description of the parties in the House Airway Bills and observed that the plaintiff was described as the issuing carrier's agent. On the issue of set off, counsel submitted that the defendant did not make any plea for set off in its entire defence and that neither was the set off proved to the required standards.

21. It was submitted that the plaintiff fulfilled its obligations under the contract by delivering all the defendant's 274 consignments to Amsterdam. Counsel maintained that the plaintiff produced the requisite documentary evidence through the various invoices in its bundle of documents to establish that it was entitled to the amount that it claimed.

22. **Mr. Munyu**, learned counsel for the defendant, on the other hand, submitted that the crux of the dispute was whether the plaintiff was contracted as a freight forwarder or a carrier as alleged. For this argument, the defendant cited the case of ***Al-Qahtani-Shaw-Leonard Ltd v Crossworld Freight Ltd*** 1987 CanLII4186(ON SC) where the court described the obligation of a freight forwarder. It was submitted that the plaintiff acted purely as the defendant's agent and freight forwarder with the obligation of arranging for the transportation of the defendant's goods.

23. Counsel submitted that the plaintiff was not contracted as a carrier and could therefore not seek to benefit from the limitations of liability provided for under **the Montreal Convention**. According to the defendant, the plaintiff's obligation as a freight forwarder was limited to arranging for the transportation of the consignments with carriers. Counsel observed that since the plaintiff did not own any aircrafts/planes, it was only contracted to procure transportation through the airlines as a freight forwarder.

24. It was submitted that in order for the plaintiff to benefit from the provisions of the Act and the Convention, it had to prove that it was a carrier in its primary role of doing the actual transportation. Counsel argued that the mere fact that the plaintiff issued the Airway Bills did not make it a carrier and that a freight forwarder cannot benefit from the provisions of the Act and Convention. It was submitted that the plaintiff's role was to store, handle and uplift cargo to the carrier/aircraft which are services not covered under the Act and Convention.

Analysis and Determination.

25. I have carefully considered the pleadings filed by the parties herein, the evidence that they presented, their submissions together with the authorities that they cited. I find that the main issues for determination are as follows:

> ***a. Whether there was a binding contract between the parties.***
>
> ***b. Whether the plaintiff was contracted as a Carrier or a Freight forwarder and whether the contract was subject to the conditions on limitation of liability under the Montreal Convention.***
>
> ***c. Whether the parties performed their respective contractual obligations.***
>
> ***d. Whether the defendant suffered loss as a result of breach of the agreement.***
>
> ***e. Whether the defendant was entitled to exercise the right of set off.***
>
> ***f. Whether the plaintiff is entitled to the prayers sought.***

Contract.

26. **Black's Law Dictionary, 8th Edition**, defines a contract as:

> ***An agreement between two or more parties creating obligations that are enforceable or otherwise recognizable, at law.***

27. The plaintiff's case was their agreement was contained in the various House Airway Bills issued on the receipt of each consignment. On its part, the defendant argued that no contracts were contained on the reverse side of the various House Airway Bills. The defendant however conceded that it contracted the Plaintiff, as a freight forwarder, to arrange with carriers to facilitate the transportation of its consignments to various international destinations as agreed.

28. My finding is that since there was no dispute that the parties herein entered into an agreement for the shipment of the defendant's flowers from Kenya to Holland, it goes without saying that a contract existed between them.

Whether the plaintiff was the defendant's agent/freight forwarder and not a carrier.

29. The defendant argued that it was not bound by the conditions stipulated in House Air Waybills because the plaintiff was its agent and not a carrier. I have perused the House Air Waybills that were issued by the plaintiff on receipt of the defendant's consignments and I note that they describe the plaintiff as the ***Issuing Carrier's Agent*** while the defendant is described as the shipper. I further note that on the reverse side of the said Air Waybills it is stated that;

"Carrier includes the air carrier issuing this Air Waybill and all carriers that carry or undertake to carry the cargo or perform any other services related to such carriage"

30. I also note that in some instances, the House Air Waybill contained an exclusion clause at its Handling Information section which reads as follows;

(For example, see Handling Information at pg. 250 of the plaintiff's list of document)

"The agent is in no way responsible for the spoilage of perishable cargo due to technical or operational causes. Perishable cargo is only accepted for shipment on this basis"

31. Article 11 of the Warsaw Convention provides that:

"1. the Air Waybill or the receipt of the cargo is prima facie evidence of the conclusion of the contract, of the acceptance of the cargo and of the conditions of carriage mentioned therein".

32. **Black's Law Dictionary** 10th Edition defines waybill as follows:

"Maritime law. A document acknowledging the receipt of goods by a carrier or by the shipper's agent and the contract for the transportation of those goods. Unlike a bill of lading, a waybill is nonnegotiable. A waybill ordinarily records where the goods are being sent, how much they are worth, and how much they weigh."

33. Having regard to the foregoing texts, I find that the House Air Waybills were binding contracts between the shipper/defendant and that the plaintiff was a carrier by virtue of the fact that it issued the Air Waybills wherein it is described as the Issuing Carrier's Agent.
Performance of the Contract

34. Having established the existence of valid contracts between the parties herein, the next issue for determination is whether the parties performed their contractual obligations. I note that in the plaintiff's letter to the defendant dated 18th January 2018, the plaintiff confirmed that it had obtained extra capacity in aircrafts for the Valentines Day's charters. It was not disputed that the plaintiff airlifted the defendant's flowers to Amsterdam according to the terms of their agreement.

35. The defendant's bone of contention however, was that the Plaintiff breached the terms of their agreement as it did not deliver the flowers within the agreed delivery timelines. It further accused the plaintiff of mishandling of the consignment thereby occasioning it financial loss and loss of market. The defendant further claimed that the plaintiff failed to provide sufficient cold rooms for the storage of the its consignments.

36. In ***Haji Asadu Lutale v Michael Ssegawa*** **HCT-OO-CC-CS-292-2006 the court observed** that a breach of contract entails: -

"…a breaking of the obligation which a contract imposes, which confers a right of action for damages on the injured party. It also entitles him to treat the contract as discharged if the other party renounces the contract or makes performance impossible, or totally or substantially fails to perform his promises".

37. **Black's Law Dictionary**, 9th Edition, Page 213, defines a breach of Contract as;

"a violation of a contractual obligation by failing to perform one's own promise, by repudiating it, or by interfering with another party's performance. A breach may be one by non-performance or by repudiation or by both. Every breach gives rise to a claim for damages and may give rise to other remedies. Even if the injured party sustains no pecuniary loss, or is unable to show such loss, with sufficient certainty, he has at least a claim for nominal damages".

38. Carriage by Air Act No. 2 of 1993 imports the Convention for the Unification of Certain Rules for International Carriage by Air (also known as the Montreal Convention) which is applicable in international carriage. The Convention provides that;

"Article 19 – Delay

The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo. Nevertheless, the carrier shall not be liable for damage occasioned by delay if it proves that it and its servants and agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures.

Article 39 - Contracting carrier - actual carrier

The provisions of this Chapter apply when a person (hereinafter referred to as "the contracting carrier") as a principal makes a contract of carriage governed by this Convention with a passenger or consignor or with a person acting on behalf of the passenger or consignor, and another person (hereinafter referred to as "the actual carrier") performs, by virtue of authority from the contracting carrier, the whole or part of the carriage, but is not with respect to such part a successive carrier within the meaning of this Convention. Such authority shall be presumed in the absence of proof to the contrary.

Article 40 - Respective liability of contracting and actual carriers

If an actual carrier performs the whole or part of carriage which, according to the contract referred to in Article 39, is governed by this Convention, both the contracting carrier and the actual carrier shall, except as otherwise provided in this Chapter, be subject to the rules of this Convention, the former for the whole of the carriage contemplated in the contract, the latter solely for the carriage which it performs.

39. In the present case, it was not disputed that the plaintiff performed its part of the contract by ensuring that the defendant's consignments were airlifted to the designated destination. In this regard, I find that the plaintiff performed its part of the contract and this leads me to the next issue for determination which is whether the defendant suffered loss as a result of the alleged breach of the agreement by the plaintiff.

40. The defendant argued that as a result of the late delivery of the flowers, contrary to the timelines that they had agreed upon, and further, that due to the poor storage of the said flowers, it suffered loss and damages that it quantified at a sum of 165,308.00 Euros. The defendant's case was that based on the price difference between the time of the consignment of flowers and the price obtained when they were finally delivered, it suffered loss on the value of the said flowers. In a rejoinder, the plaintiff submitted that no evidence was presented to prove that there was price differential as alleged by the defendant.

41. I have perused the correspondence between the parties herein as shown on page 8-16 of the defendant's bundle of documents. I note that the plaintiff was actively and consistently informing the defendant of the progress of the shipment and that in reply, the defendant stated as follows: -

"With reference to your call today we are worried as you informed us that there is no space tomorrow and not to deliver any boxes tonight to Air connection/ Panalpina. This is not possible; we can understand that there is airspace tomorrow. However, you cannot say not to deliver boxes tonight and there will be no uplift tomorrow……"

42. I have also perused the email correspondence dated 23rd January 2018 and 27th January 2018 at page 10 of the said bundle wherein the plaintiff informs the defendant of its inability to have capacity to ship the consignment. Having regard to the above correspondence, I find that if there was any loss occasioned to the defendant, then the same can be said to have been occasioned by circumstances beyond the parties' control. This is in light of the provisions of Article 20 of the Convention which states that the carrier is not liable if he proves that he had taken all necessary measures to avoid damage or that it was impossible to take such measures. I also note that no tangible evidence was presented to prove that the consignment was destroyed due to poor storage or that it would have fetched such profits as has been estimated by the defendant.

43. The defendant is on record as acknowledging the fact that the plaintiff does not own any aircrafts/aero planes and that the plaintiff relied on the availability of space in various airlines to ferry the defendant's flowers. It therefore beats logic for the defendant to blame for plaintiff for delay/lack of space in the aircrafts which the defendant had no control of in the first place. Furthermore, no evidence was presented to show that it was a term of the agreement that the flowers would reach Amsterdam before a given date.

44. This court takes judicial notice of the fact that transportation by air can be fluid and uncertain with delays sometimes occurring due to different reasons that may be beyond the control of even the airlines. The plaintiff argued that save for the instances where a carrier has been contracted to perform the carriage within an agreed time, its obligation is to perform it within a reasonable time. The plaintiff maintained that no liability for delay arises until the agreed time or a reasonable time, as the case may be, has lapsed.

45. On whether the plaintiff is entitled to the orders sought in the plaint, I note that the defendant admitted that all its flowers reached their intended destination and that it allegedly set off its claim of 165,308.55 Euros for the loss that it suffered against the plaintiff's total invoice of USD 304,903.31 and paid the plaintiff the net sum of USD 101,574.47. Having found that the agreement between the parties is governed by the Montreal Convention, I find that the plaintiff is absolved of any liability as the plaintiff's actions were reasonable as it took all the necessary measures to inform the defendant of the availability of space in the aircrafts at every turn.

Set Off

46. It is a settled principle in law that the right of set off arises where the plaintiff's claim is a for a liquidated sum and the defendant has counterclaimed for a debt which if established, will extinguish or reduce the plaintiff's liquidated claim. In ***Union of India v Karam Chand Thapar and Bros. (Coal Sales) Ltd. and Others*** [(2004) 3 SCC 504] the Supreme Court of India discussed the concept of set off as follows:

"Set –off" is defined in Black's Law Dictionary (7th Edition, 1999) inter alia as a debtor's right to reduce the amount of a debtor by any sum the creditor owes the debtor; the counterbalancing sum owed by the creditor. The dictionary quotes Thomas W. Waterman from 'A Treatise on the Law of Set –Off, Recoup-ment, and Counter Claim' as stating, "Set-off signifies the subtraction or taking away of the demand from another opposite or cross demand, so as to distinguish the smaller demand and reduce the greater by the amount of the less; or, if the opposite demands are equal, to distinguish both. It was also formerly, sometimes called stoppage, because the amount to be set-off was stopped or reduced from the cross-demand."

47. As I have already stated in this judgment, the defendant's claim was that it suffered loss of 165,308 Euros due to alleged late delivery and poor storage of the flowers. The defendant stated that it set off its loss from the sum of money that was due to the plaintiff for its services.

48. The plaintiff submitted that since the defendant did not file any counterclaim, there was no evidence from the consignee on the price he expected to sell the flowers and the price that he actually sold them for. For this argument, the plaintiff cited the decision in ***Panalpina International Transport Ltd. v Densil Underwear Ltd.*** [1981] 1Loyd's Rep 187 wherein the court allowed a counterclaim, based on 21 days' delay in delivery of goods, after considering the evidence tendered by the consignee who testified on the price he would have sold the

goods had he received them before Christmas and the price he actually sold them for.

49. In the instant case, the defendant did not file any counterclaim or tender the evidence of the consignee regarding the prices in the flower market at the time so as to justify/prove the defendant's special claim under the set off. The defendant however argued that set off constitutes a valid defence to a claim which the court ought to consider even in the absence of a counterclaim. The defendant relied on the decision in ***Twiga Chemical Industries Ltd. v Rotam Agrochemical Co, Ltd.*** Civil Appeal No. 16 of 2016 [2019] eKLR wherein the court stated as follows on the import of pleading set off in the defence:

> "***In the end, we agree with the finding by the trial court that the appellant was in effect pleading a set-off. However, with respect, we do not accept the conclusion reached, as a matter of law, that the set –off could not amount to defence and was hence frivolous and a waste of the court's time. We find no support for such principle. In the case of Kenya Oil Company Ltd vs Kenya Ports Authority [2009] e KLR, Kimaru J. stated as follows, and we agree:***
>
> "***It cannot be said that where the plaintiff has established its claim by providing documentary evidence, then the counterclaim and set off by the defendant should be tried separately and judgment be entered for the plaintiff as against the defendant. I think it would be a travesty of justice if the court were to discount a set off raised by the defendant in its defence on the sole ground that the transaction that resulted in the defendant's claim in the set off is a separate cause of action from the set of facts that prompted the plaintiff to file suit against the defendant. The authors of Atkin's Encyclopaedia of Court Forms in Civil proceedings, 2nd Edition volume 1, 1978 Issue, aptly set out the import of a set off in a defence;***
>
> "***59. Set- Off. Where a claim by a defendant to a sum of money (whether of an ascertained amount or not) is relied on as a defence to the whole or part of a claim made by the plaintiff it may be included in the defence and set off against the plaintiff's claim, whether or not it is also added as a counterclaim (h). A set-off in its nature a defence rather than a cross-claim(i). A right of set-off normally arises where the plaintiff's claim is a debt or liquidated demand and the defendant has cross-claim for a debt or liquidated demand which, if established, will extinguish or reduce the plaintiff's money claim (k), and should be pleaded as such."***

50. The defendant further referred to the decision in ***Vithaldas v Hyderabad Spinning & Weaving Co. Ltd.*** (1022) 21 Bom. 328 where it was held:

> "***A set-off can be pleaded as a defence and can only arise where the claim to be set off one against the other whether by the plaintiff if defendant exists in the same right. A set –off can also be the subject- matter of a separate action or a counterclaim. And hence the confusion between the terms, as though every set-off can be pleaded as a counterclaim if the defendant BO desires, every counterclaim cannot be pleaded as a set-off. It would be much better if the two terms were kept distinct, and that if an equitable set-off is to be allowed"***

51. Having regard to the dictum in the above cited cases regarding the manner in which the plea of a set off may be presented, I find that the defendant did not have to plead the set off or a counterclaim and that the court can still go ahead and consider the set off as pleaded in the defence. Be that as it may, the mere fact that the defendant is at liberty to plead the set off without filing a counterclaim does not preclude the defendant from proving the set off to the required standards.

52. My finding is that the only way this court can determine if the defendant was entitled to set off the amount it alleged was due to it for loss in the value of the flowers was through the presentation of evidence to prove that such loss was truly incurred. As I have already noted in this judgment, the defendant did not tender any evidence from the consignee to prove that the amount that the flowers were eventually sold for was lower than their expected value. My finding is that in the circumstances of this case and based on the evidence availed before this court, the defendant was not justified in deducting the amount totaling to USD 203,328.84 (Euro 165,308.355) from the amount that was due to the plaintiff for the services that it rendered to the defendant.

Whether the plaintiff is entitled to the amount claimed in the plaint.

53. The plaintiff's claim was for the sum of USD 341,907 on account of freight forwarding services. The defendant however noted that out of the plaintiff's said total claim, the sum of USD 91,941.41, though appearing in the summary of the alleged outstanding invoices, was not supported by the actual invoices and the house airway bills. The defendant highlighted the alleged invoices as follows: -

	Date	*Alleged Invoices No's*	*Amount in USD*
a)	*03/09/2017*	*123741*	*1809.69*
b)	*18/02/2018*	*145515*	*3624.18*
c)	*20/02/2018*	*145851*	*805.10*
d)	*20/02/2018*	*145856*	*1975.72*
e)	*21/02/2018*	*146214*	*5133.66*
f)	*27/02/2018*	*146276*	*78596.16*

Total -USD 91,941.41

54. The plaintiff countered the defendant's claim on the issue of invoices by submitting that the same was an afterthought as it not pleaded in the defence or raised during the hearing.

55. I have perused the defence filed by the defendant herein and I note that the plaintiff's claim for the sum of USD 341,907 was denied by the defendant at paragraph 16 of the Defence. In view of the said denial, the plaintiff was expected to prove its claim to the required standards. It is trite law that a claim of special damages must not only be pleaded but must also be strictly proved. In this regard, the plaintiff was not only expected to provide a list of the various invoices that it allegedly sent to the defendant but it was also expected to produce the said invoices, together with the relevant House Air Waybills.

56. I have gone through the plaintiff's entire bundle of documents with a fine tooth comb and I note that invoices number 123741, 145515, 145851,145856,146214 and 146278 for the total sum of Kshs 91,941.41, even though listed in the claim, were not attached to the plaintiff's bundle of documents. I therefore find that the sum presented in the said invoices ought to be deducted from the total sum claimed by the plaintiff, thereby making the total sum due to the plaintiff to be USD 249,965.59.

57. In conclusion and having regard to the findings that I have made in this judgment, I find that the plaintiff proved its case against the defendant to the required and I therefore enter judgment for the plaintiff against the defendant in the following terms

i. Payment of the sum of USD 249,965.59 together with interest at court rates from the date of filing this suit till payment in full.

ii. Costs of the suit together with interest at court rates from the date of this judgment till payment in full.

Dated, signed and delivered via Microsoft Teams at Nairobi this 18th day of March 2021 in view of the declaration of measures restricting court operations due to Covid -19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17th April 2020.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Kahura for plaintiff.

Mr. Githua for Miss Keru for defendant.

Court Assistant: Silvia