



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

(CORAM: R. MWONGO, J.)

CIVIL SUIT NO. 4 OF 2017

(Formerly Nakuru HCCC No. 63 of 2017)

HANGZHOU AGROCHEMICALS INDUSTRIES LIMITED.....PLAINTIFF

VERSUS

PANDA FLOWERS LIMITED.....DEFENDANT

JUDGMENT

1. The Plaintiff is an agrochemicals supplier. It alleges that it supplied chemical products worth Kshs 35,307,900/= to the Respondent in the months between August and December, 2008. The supplies were allegedly made on the basis of a sixty days credit arrangement. The brief plaint claims the full price of supplied chemicals, general damages, costs and interest.

2. Paragraph 3 of the plaint, which subsumes the substantive claim founding the prayers is worded as follows:

“3. On various dates between the months of August and December (both months inclusive) in the year 2008 the Plaintiff supplied chemical worth Kshs 35,307,900/= to the Defendant on credit terms” (Emphasis added)

3. Thus, at the very least, the Plaintiff is required to prove supplies made to the Defendant in the months of August to December, 2008, their value, and show that such supplies were not paid for despite being invoiced.

4. The Defendant is a floricultural company. Its flowers are mostly for export. It denies owing the amount claimed, denies existence of a sixty days credit line, and denies refusing to make payment for any legitimate deliveries. It alleges that deliveries made were of chemicals of adulterated, highly questionable standards and efficacy; that the supplies did not meet specifications, were substandard and harmful to the soil and plants. They allege that the Plaintiff fraudulently supplied chemicals that were not to standard; that as a result they incurred substantial losses. They set out particulars of fraud.

5. The Defendant also filed a counter claim alleging that in 2007 its production agents were approached by the Plaintiff’s sales persons, and agreed to purchase some of the Plaintiff’s products. From 2008, it became evident that the initial gains they had witnessed saw a worrying reversal trend. They therefore conducted a control test under which certain fields were segregated and put under different products at the same time testing the products in laboratories. The results allegedly confirmed to them that the Plaintiff’s products were adulterated.

6. As a result, the Defendants allege fraud and have particularized special damages. Their counter-claim is for Kshs 110,000,000/=, general damages, costs and interest.

7. The Defendant will, at minimum have to prove that there was fraud by the Plaintiff, leading to loss of crop, resulting in special damages of Kshs 110,000,000/=.

8. At the hearing, the Plaintiff availed four witnesses and the Defendant brought five witnesses. All witnesses had filed witness statements which were adopted, and the witnesses were cross-examined and re-examined.

The Plaintiff’s Case

9. PW1, Eugene Reeksting stated that he was the General Manager of the Defendant from August 2006. He moved on to another entity Flower Business Park where he served as General Manager in 2007 - 2008. According to him, the directors of Flower Business Park and Panda Flowers Limited are the same.

10. PW4 Xueling Ge, a director of the Plaintiff testified that the company supplied chemicals worth Kshs 35,307,900 to the Defendant on 60 days credit terms. The moneys due, he said, were not paid.

11. In cross-examination he said they trusted their product; that they were not requested to be involved in any testing of the products supplied, and that he only became aware of testing from court documents. He asserted that they were never notified of any dispute and it was only several years later that the Defendant alleged that the product had a problem.

12. PW4 availed a bundle of documents comprising mostly of numerous invoices, some statements of the Plaintiff's account with the Defendant, and four laboratory Certificates of Analysis all dated 12th September, 2011 by the Pest Control Products Board (PCPB). The laboratory certificates show that samples of fertilizer product were availed to the PCPB laboratory in March 2009 and analysis took place on 6th July, 2009. They are marked as Lab Sample Numbers A70/11 to A73/11.

13. PW3 George Ndegwa Kariuki's testimony was that he was the Production Manager of Panda Flowers Limited. He had a Masters degree in Crop Protection and Entomology. He dealt with the Plaintiff through its County Manager Edwin Irungu. The Plaintiff used to supply fertilizers and pesticides to Panda Flowers Limited for use as the end user. The products supplied were used successfully and did not adversely affect the flowers grown by Panda Flowers Limited. In 2009, he was instructed by his bosses not to requisition any more supplies from the Plaintiff on the allegation that their products were fake which was not true.

14. In cross-examination, he said that in 2009 he was reporting to Mr. Igal Elfezouaty the Managing Director. He also reported to either Eugene Reeksting or Richard Heckle as there were many entities involved, which were owned by Mr. Igal. He admitted that he was not the last authority on requisitioning fertilizers but was the final authority on their use. He said fertilizers were obtained from many sources.

15. PW2 Jack Juma, is an Agronomist accredited by the Pest Control Products Board to conduct efficacy trials on newly introduced pesticides in Kenya. He has a MSc in Agronomy and does consultancy work. His accreditation is for insecticides relative to vegetables, flowers and carnations. He assessed and reviewed the Expert Report of Dr. Samuel Were and the financial report of Kishan Iyengar, the Defendants financial director. His expert opinion attached to his witness statement was dated 30th October, 2019.

16. In cross-examination, he said he relied on reports by others given to him and he looked at the way the processes were carried out.

17. In re-examination, he highlighted the areas of his concern, viz that most products chemicals and fertilizers were expired as they had a shelf life of 3 years; that when sampling was done there was no third party present to verify if they were intact at the time samples taken to the labs; and that fertilizers were subjected to tests for pesticides, that is, to both nutritional and insecticidal properties. It appeared that the testers had prior knowledge that there was pesticide infusion; and finally, that on looking at the stock list there were contaminants.

The Defence Case

18. DW4 Igal Elfezouaty is the Managing Director of Panda Flowers Limited, the Defendant. He testified that they had requisitioned various products in the category of foliar fertilizers which the Plaintiff supplied from about 2007. Over time, the fertilizer supplied was not what was requisitioned as it contained chemical properties that should not have been in foliar fertilizers. He noticed a sharp drop in production and quality over the period of supply.

19. He testified that, as management, they investigated the matter, did tests locally and abroad, and discovered that the Plaintiff was supplying the wrong product. They also discovered from in-house investigations that some of their staff had been compromised to accept defective, substandard and adulterated supplies. These staff included Eugene Reeksting who was with Flower Business Park and George Ndegwa the Panda Flowers Limited Production Manager. The latter was, apparently, accruing some benefit through proxy.

20. In light of the situation, DW4 reorganised the department and Ndegwa was replaced by a foreign employee. DW4 said that during that period, Panda Flowers Limited suffered poor yields, lost business, and got negative reviews on the sensitive international flower market. This reflected in the negative financials for the company, which only reversed after Panda Flowers Limited ceased using the Plaintiff's products.

21. DW4 said the Defendant's financials were prepared by the Financial Director Kishan Iyengar, DW1, and that he stood by those financial reports.

22. In cross-examination, DW4 confirmed that Panda Flowers Limited exported flowers to the European market; that the Plaintiff began supplying products in 2007; that Eugene Reeksting did not work for Panda Flowers Limited but for him in Flower Business Park Limited which provided services to the different farms but does not deal with growing of flowers. A letter to the Principal Immigration Officer at Defendant's Bundle Page 63 confirmed this. He added that George Ndegwa had confirmed to him that the Plaintiff's products were adulterated; that Ndegwa resigned after he hired another person to serve who Ndegwa would deputize; that Panda Flowers Limited used several suppliers for chemical products.

23. In addition, he admitted that it is usual for different chemicals to be used for flowers; and in particular that *"it is not possible to directly pinpoint the chemicals to the loss, you have to make an inference, but if you investigate you can pinpoint,"* that they did not test the other products used on the flowers. When shown pages 10, 12, 14, 16 and 17 of the Defence Bundle he confirmed the reports by Kenya Plant Health Inspectorate Service (KEPHIS) were done in 2012, yet the product manufacture dates were 2007 and expiry date 2010. DW4 also admitted that the product was analysed when it had expired; that the products were stored at his house and that no one could interfere with them as they were under lock and key.

24. DW2 David Michuki Mungai was the Assistant Production Manager at Panda Flowers Limited between 2007 and 2011. He disputed PW3's evidence that the products sourced from the Plaintiff were of fine quality. He said the products were fine at the beginning of 2007, but

he later noticed the leaves of plants were showing deficiencies, which they attributed to lack of nutrients. Soon after, production dropped. He stated that the product came as a fertilizers but when sprayed on plants it would kill pests, which was not the function of fertilizers.

25. When he raised the issue with PW3 who was his boss, he found him unresponsive. So he raised the issue with DW3, who immediately stopped the use of the products. After the stoppage, DW3 noticed significant change in the quality of their roses.

26. In cross-examination, he said he had a BSc degree in Agriculture; that they use pesticide throughout the life cycle of the flowers; that they stocked both fertilizers and pesticides; that when they noticed the crops doing badly it was not only the Plaintiff's products that were being used; that he could not say how much product was received from the Plaintiff during the material period; that he did not deal with the receiving of product as this was done by others in the stores; that the Plaintiff's products were fertilizers and were not under the Pest Control Products Board (PCPB) which regulates pesticides.

27. Anthony Wachira Wanjau, DW3, testified that he made the Expert Report at Page 49 - 53 of the Defendant's Documents. He is an Occupational Safety Health Officer in the Ministry of Labour. He was presented with results of tests done by KEPHIS from samples taken to them by the Defendant. He noted that what was written on the sample labels differed from the contests analysed in the labs.

28. Since the Ministry's concern is the safety of workers, he detailed aspects that affected workers. His conclusions were that workers were exposed to unwarranted risks and that there should be prosecution to pre-empt such future conduct.

29. In cross-examination, he admitted that his report was made as recently as 21st June 2019 and not 2009; that he did not liaise with KEPHIS; that he used their report to make his report; that he was not privy to any analysis on any results brought by the Plaintiff; that though he was aware that officers under the Occupational Safety Directorate had power to prosecute he was not aware if any prosecution that had taken place. He further admitted that the PCPB does not deal with fertilizers but with pesticides.

30. DW1 Kishan Iyengar, has been the Defendant's Financial Controller since October 2004. He testified that the company's financial records showed losses for the material period. It was he who prepared the financials and graphs exhibited by the Defendant.

31. In cross-examination, he said that his financial report covered the period 2007 - 2013; that the Defendant stopped using the Plaintiff's product in 2008 but continued using supplies from other suppliers; that the nature of production determines the use of chemicals.

32. He admitted that he did not capture the various products used for various crops as per department set out in his report; that his report is pegged on an annual period; that *"during 2007 - 2009 there was no depression and Panda Flowers Limited did not suffer any depression-related loss"*. He admitted that Panda Flowers Limited files taxes annually; and that he *"drew a nexus between negative financial growth and use of products of the Plaintiff"*.

Analysis and Determination

33. I have considered the evidence given by the parties, the documents exhibited, and the pleadings and the parties' disparate lists of issues. I think that the issues for determination are fairly simple. They are:

1. Whether the Plaintiff supplied chemical products to the defendant worth Kshs 35,307,900/= during the period August to December, 2008.
2. Whether there was a credit limit of sixty (60) days applicable for the supply of product resulting in the Plaintiff owing Kshs 35,307,900/=.
3. Whether the Plaintiff supplied goods of adulterated quality to the Defendant.
4. Whether the Defendant suffered loss of Kshs 110,000,000/= as special damages.

Whether during August - December 2008 the Plaintiff supplied products to Defendant worth Kshs 35,307,900/=

34. The evidence of supply of the fertilizers was availed through the oral testimony of PW4 the Plaintiff's Director and PW3 who had previously worked for the Defendant. The Defendant's witnesses also admitted that chemical product was supplied, albeit they allege that it was not of the proper merchantable quality.

35. What quantity of the product did the Plaintiff supply during August to December 2008? This is evidenced by serially numbered Delivery Notes exhibited in the Plaintiff's Bundle. I have carefully perused the Plaintiff's bundle. Between pages 8 and 41 there are Delivery Notes for various products (Napoleon, Abamite, Hummer Calcium Foliar plus, Rozella, Floxell, Green Sea Fertilizer etc). The Delivery notes are stamped received with the Defendants stamp. Receipt was not denied by the Defendant. The Delivery Notes do not indicate the price but they indicate an Invoice number to which they relate.

36. The price is indicated in numbered computer generated Invoices raised by the Plaintiff, each of which makes reference to one or more Delivery Notes. The Invoices are also in the Plaintiff's Bundle interspersed with the Delivery Notes.

37. In the absence of any explanation by the Plaintiff who did not avail either an accountant, administrator or procurement officer to testify, the court was forced to tediously comb through the documentation to try to correlate each Delivery Note with each invoice where available. In the end, the Court found that:

- There are 23 Delivery Notes for the period in question in the claim (August - December, 2008).
- There are 18 Invoices that match the Delivery Notes.
- Five Delivery Notes could not be matched or correlated to any invoice.
- The total value of Invoices that could be matched to Delivery Notes was Kshs 22,035,100/=.

38. The next issue is to ascertain whether or not the invoices were paid. The Plaintiff made a blanket allegation that the invoices were not paid. As earlier indicated, there was no witness available to explain the internal administration or workings of the Plaintiff's delivery, invoicing, receipting and accounting processes. Thus, the court had to again forage through the Plaintiff's bundle to best make out what it could of the information therein.

39. The Court found that there are three photocopied cheques at Pages 58 and 59 of the Plaintiff's Bundle. They are drawn on the Defendant Panda Flowers Limited's Stanbic Bank account and the drawee is the Plaintiff. They are:

- a. A Cheque dated 12th February, 2009 for Shs 540,800
- b. A Cheque dated 05th February, 2009 for Shs 572,900
- c. A Cheque dated 28th January, 2009 for Shs 500,000

These total only Kshs 1,613,700/=. They are stamped received at Standard Chartered Bank and National Bank respectively.

40. There was no testimonial explanation given concerning the cheques which are annexed next to the KRA PIN numbers of both Plaintiff and Defendant. Thus, without any explanation, the Court is unable to relate the cheques to the Delivery Notes or Invoices, except to say that they would, potentially, be evidence of a payment by the Defendant to the Plaintiff. No other cheques were shown. Was the Plaintiff arguing that these displayed cheques constitute the only payment thereof? Or were they an indication that payments were not made in whole for each invoice but they were being paid in piecemeal instalments? The Court cannot know without receiving an explanation from the person exhibiting the documents.

41. The Plaintiff's Bundle also exhibited computer-generated statements of the Plaintiff's Account with the Defendant. The first set of statements is dated 2nd March 2009 and covers the period from 26th November, 2007 to 13th February, 2009 and has six unnumbered pages. That set shows an opening balance of Shs 10,248,300/= owed to the Plaintiff and ends with a closing balance of Kshs 30,285,900 owed to the Plaintiff. The statement captures dates, invoice details, payments details and balances. No explanation was given to the court concerning this statement or how it is to be treated and reckoned. The Court notes however, that the total amount claimed as outstanding for the entire period of the statement is less than the pleaded amount.

42. The second set of statements exhibited by the Plaintiff is at page 61 of the Plaintiff's Bundle and is dated 16th February, 2009. It covers the period from 5th April, 2007 to 12th February, 2009. The opening entry is a debit of Kshs 240,000/= and the closing balance is Kshs 34,767,100/= payable to the Plaintiff. In the absence of explanation, the Court assumes this is the more up to date statement as the alleged outstanding figure reflects a figure closer to the figure demanded by the Plaintiff of Kshs 35,307,900/=. The court acknowledges that such assumption is made in the absence of explanation, and could therefore be tantamount to speculation.

43. There are discrepancies which the court notes between the two sets of statements as follows.

44. The first statement, though dated 2nd March 2009, shows an outstanding balance of Kshs 30,285,900/= due to the Plaintiff as at 13th February, 2009. The last three entries in the statement are for 12th and 13th February, 2009, respectively.

45. The second statement though dated earlier, 16th February, 2009, shows the outstanding balance to be Kshs 34,767,100/= due to the Plaintiff as at 12th February, 2009. The last three entries are for 5th February and 12th February, 2009, respectively.

46. In addition, although the statements would be expected to contain exactly the same information for similar dates, there are differences in the outstanding balances allegedly payable by the Defendant at similar intervals. This is what they show the balances payable are:

Date	Statement 1	Statement 2
	(2 nd March, 2009)	(16 th February, 2009)
30/12/2008	31,285,900.00	31,285,900.00
28/01/2009	29,785,900.00	34,807,900.00
13/02/2009	30,285,900.00	34,767,100.00

47. The statements were exhibited by the Plaintiff. No explanation or clarifications were adduced through testimony. No witness spoke to the Plaintiff's account and delivery records at all.

48. For purposes of this case, however, the Court relied on the latter statement, noting that the Plaintiff's claim was that there was non-payment for supplies made between "the months of August and December, 2008" (Plaint paragraph 3). The court can only isolate, for consideration, that part of the statement that commences in August 2008 and ends in December 2008.

The summary of the picture painted by the Plaintiffs Delivery Notes, Invoices and Statements for the period August to December, 2008 is as follows:

PLAINTIFF'S BUNDLE - PAGES 2 TO 54

<u>S/ NO</u>	<u>DELIVERY NOTES (SHOWN)</u>			<u>INVOICES EXHIBITED</u>			<u>PLAINTIFF'S STATEMENT</u>	
	<u>PAGE NO.</u>	<u>DATE DELIVERY</u>	<u>OFDELIVERY NOTE</u>	<u>PAGE NO.</u>	<u>INVOICE NO.</u>	<u>INVOICE AMOUNT</u>	<u>DATE</u>	<u>AMOUNT CREDITED</u>
1.	41	14/08/2008	347	39	1287	421,500	05/08/2008	550,000.00
2.	40	20/08/2008	1050				13/08/2008	550,000.00
3.	38	29/08/2008	1203				18/08/2008	315,000.00
4.	37	30/08/2008	1087				22/08/2008	575,000.00
5.	37	30/08/2008	1086	36	1320	2,072,900	24/08/2008	315,000.00
6.	34	12/09/2008	1210	33	1347	540,800	30/08/2008	577,500.00
7.	32	23/09/2008	1193	31	1372	192,800	31/08/2008	545,000.00
8.	30	27/09/2008	1223	29	1382	264,000	10/09/2008	550,000.00
9.	27	06/10/2008	1417	26	1410	652,000	21/09/2008	550,000.00
10.	25	13/10/2008	1231	24	1435	1,598,000	30/09/2008	550,000.00
11.	23	16/10/2008	1428	22	1445	242,000	06/10/2008	575,000.00
12.	21	25/10/2008	1239	20	1474	5,640,000	10/10/2008	550,000.00
13.	19	27/10/2008	1241	18	1477	165,000	15/10/2008	575,000.00
14.	16	29/10/2008	1242	15	1469		18/10/2008	575,000.00
15.	16	29/10/2008	1243	15	1469	4,687,000	21/10/2008	550,000.00
16.	13	30/10/2008	1247				24/10/2008	575,000.00
17.	14	14/11/2008	1515	13	1533	814,000	25/10/2008	185,600.00

18.	12	28/11/2008	1537		1557		31/10/2008	575,000.00
19.	12	28/11/2008	1532				01/11/2008	1,128,000.00
20.	12	28/11/2008	1529	11	1557	3,483,600	01/11/2008	550,000.00
21.	10	06/12/2008	1654	9	1588	140,000	05/11/2008	575,000.00
22.	6	14/12/2008	1599	5	1630	841,500	07/11/2008	256,750.00
23.	8	19/12/2008	1658	7	1624	280,000	08/11/2008	1,128,000.00
24.							10/11/2008	550,000.00
25.							15/11/2008	575,000.00
26.							15/11/2008	1,128,000.00
27.							21/11/2008	445,000.00
28.							22/11/2008	256,750.00
29.							22/11/2008	1,128,000.00
30.							24/11/2008	251,000.00
31.							29/11/2008	1,128,000.00
32.							01/12/2008	399,700.00
33.							05/12/2008	575,000.00
34.							10/12/2008	575,000.00
35.							10/12/2008	140,000.00
36.							12/12/2008	157,800.00
37.							18/12/2008	575,000.00
38.							22/12/2008	128,200.00
39.							22/12/2008	450,000.00

40.	25/12/2008	575,000.00
41.	27/12/2008	192,800.00
42.	30/12/2008	477,600.00
43.	31/12/2008	<u>575,000.00</u>
	TOTAL	22,035,100
		23,158,700.00

50. When the Court took the said statement and analysed the period from August 2008 to December 2008, the Court found as follows:

- The total amount for Invoices with matching Delivery Notes is Kshs 22,035,100/=.
- However, for the same period August to December 2008 there are a total number of 41 payments/credits to the tune of Kshs 23,158,700/- as reflected in the statements.

No explanation was given as regards these figures, and the court cannot manufacture any conclusions without clear guidance from parties' evidence.

51. In **Shadrack Mathias & another v Agnes Muluki Wambua [2021] eKLR** Odunga J. stated:

*“20. This Court has had occasion to deprecate that mode of conducting legal proceedings. Parties, when they intend to have documents admitted without calling the makers ought to ensure that there is no inconsistency in the documentation since where a consistency arises it can only be resolved by calling the makers who would ordinarily be subjected to cross-examination in order to confirm their veracity. That would be case where two inconsistent medical reports were by consent produced by the parties. To my mind once parties agree on liability they ought to endeavour to harmonise the various medical or expert reports on record and agree at a common ground regarding the basis upon which assessment of damages is to be undertaken. If they are unable to do so, the makers of those reports ought to be called where the reports are conflicting for cross-examination. It is however unfair to the court to just throw all manner of reports at the court and expect the court to decide which ones to rely on and which ones to discard since as was appreciated by Ringera, J (as he then was) in **Trust Bank Limited vs. Ajay Shah & 2 Others Nairobi HCCC No. 875 of 2001**:*

“the court is not bestowed with the gift of omniscience; it can only make a finding on the defendant’s state of mind on the basis of either a confession from himself or on the basis of an inference drawn from other facts to be proved otherwise.”

52. Similarly in the present case the Plaintiffs did not call the makers of the delivery notes, invoices and statements produced by the Plaintiffs. An officer who could speak to the documents ought to have been availed to explain what was going on and the discrepancies in the figures for the period August 2008 to December 2008.

53. In **Butex Company Ltd v Bollore Africa Logistics Kenya Ltd [2019] eKLR** where the defence wished to produce a forensic audit report as evidence, it was stated:

“11. Further it is the duty of a court in adjudicating over cases between parties can only be realized and be seen to done when a party is allowed a chance to ventilate its case with all the evidence available to it and as it deems fit, with regard to the circumstances of the case.” (Emphasis added)

54. In order to effectively ventilate its case, a party must be robust in engaging the court in respect of documents supplied to the court to be relied on by that party and the court.

55. The same principle of having a party ventilate its case through its documents is seen in **Shell (U) Ltd v Achilles Mulaiibi CACA No. 69 of 2004** where the Uganda Court of Appeal stated in respect to proving damages:

“a plaintiff must understand that if they bring an action for damages it is for them to prove their damages. It is not enough to write 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 be proved.” (Emphasis added)

56. Thus, unless documents filed by a party contain material that is entirely self-explanatory and self-evident or so clear as to warrant no explanation or clarification, it is the duty of the party producing such documents to call their maker or someone in authority knowledgeable

of their content to speak to the documents and explain what it is they represent the context in which their content was generated, and how they were made. If they relate to multiple transactions, the party should explain the connections and how one transaction relates to another or how they complement each other, in what order they flow and how the content relates to the claim or question in issue. If they have internal discrepancies or disclose discordance of any sort, it is for the witness of the party relying on the documents to explain the discrepancies to the Court and remove any queries or uncertainty in them that the court may be faced with.

57. This absence of explanation coupled with the discrepancies noted in the documents leaves the Court in an uncertain situation. Due to this absence of explanation by any witness as to whether, for example, the court should find that the seemingly unpaid invoices of Kshs 22,035,100 were then paid by the credits shown of Kshs 22,058,400 the Court is unable to deduce the amount. If so, however, the result would be (Kshs 23,158,700/= - Kshs 22,035,100/=) which would give an amount overpaid by defendant of Kshs 1,123,600/=.

58. In the absence of explanation even that finding cannot be reasonably made. Ultimately, the court is unable, in the absence of clarification by any witness, to determine with reasonable certainty the amount due from the Defendant to the Plaintiff for the period August to December 2008. Accordingly, without clear proof of any figure on balance, no amount is awardable.

Whether there was a credit limit of sixty days

59. Paragraphs 3 and 4 of the Plaintiff assert that the Plaintiff supplied chemical products:

“to the defendant on credit terms”

There was no averment in the plaintiff that the supply was on a sixty day credit basis. The Defence denied paragraphs 3 and 4 of the Plaintiff and put the Plaintiff to strict proof. In addition, in paragraph 6 of the defence the defendant denied knowledge of being offered a credit limit of sixty days.

60. The assertion that there was a sixty day credit arrangement was made in the Witness Statement of PW4 Xueluang Ge dated 27th April, 2012. There he asserted:

“We therefore agreed that the supply of the chemical products on credit was on the understanding that the credit limited (sic) would only be for and would not exceed 60 days for each supply delivered to the defendant.”

61. Other than the above assertion by PW4, the Plaintiffs did not provide evidence of any agreement for the alleged credit terms. No issue arose on it from the evidence adduced. In the absence of any concrete evidence to support the alleged agreement of credit terms, the assertion is just that - a mere assertion. Further, none of the parties submitted on this issue in their final submissions suggesting it to be an issue of low or little importance. Accordingly, I see no purpose of making a finding on the issue. It is moot.

Whether the Plaintiff supplied goods of adulterated or unmerchantable quality

62. The parties directed most of their focus and attention to this issue. The claim of adulteration, low standards, or unmerchantability was made by the Plaintiff in their defence and counterclaim. They assert that there were supplies by the Plaintiff which were not in accordance to agreed specifications or were fraudulently or negligently passed off as the specific goods ordered.

63. The Defendant then cited six particulars of fraud and negligence in paragraph 7 of the defence as follows:

- i) Passing off substantially adulterated products as genuine standard chemicals.*
- ii) Supply chemicals of highly questionable standards and efficacy, and which products could not pass laboratory tests on verification of content and composition as done in various highly reputable laboratories locally and abroad, for being too deficient on required active ingredients or in some samples having dangerously high content enough to make the soil toxic.*
- iii) Failure to meet order specifications to supply the core requisition for fertilizers and billing the Defendant for substandard chemicals dangerously deficient on all essential active ingredients.*
- iv) Supplying chemicals that had harmful effects on the Defendant's crops and soil structure.*
- v) Openly and illegally affixing misleading labels on products of a different standard other than what was ordered.*
- vi) Supplying goods imported from China, or other sources, that cannot meet Kenyan Standards as set out by the Kenya Bureau of Standards (KEBS), the Pharmacy and Poisons Board, Pest Control Products Board, or any other relevant regulatory authority.*

64. In addition, in paragraph 20 of the Defendant's counterclaim, they set out the following particulars of fraud:

- i) Enticing the Defendant initially with a standard product only to gradually adulterate the same.*
- ii) Importing and supplying products not fit for the purposes intended, to the extent of being useless to crops or toxic to the soil and environment in general.*

iii) Supplying goods with minimal or no active ingredients, but passing them off as genuine and competitive products, or goods with arbitrary percentages of active ingredients contrary to affixed labels.

iv) Causing to be placed on their packaging, misleading labelling of substandard products with labels declaring to the world, and to the Defendant in particular, that they were products of acceptable efficacy.

65. At the end of paragraph 20 of the plaint, the Defendant went on to particularise special damages arising from the alleged fraud. The alleged special damages amount to Kshs 110,000,000/=. They are particularized under the special damages title in particulars (i) and (viii) of that paragraph as follows:

“(i) Incurr(ed) costs of more than Kshs sixty million purchasing worthless substances being passed off as genuine agrochemicals and foliar fertilizers which amount the defendant now claims.

.....

(viii) Causing the Defendant to suffer a staggering combined loss of not less than Kshs 55 million.”

The Defendant is thus expected to prove the particulars of special damages.

66. The evidential standard for proof of fraud is higher than a balance of probabilities but lower than the criminal standard of proof beyond reasonable doubt. Evidence of especially high quality and strength is required to discharge the high burden of proof in a case alleging fraud. See **Central Bank of Kenya Ltd v Trust Bank Ltd & 4 Others Civil Appeal No. 45 of 1996** where the Court stated:

“Fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof was much heavier on the Appellant in this case than in an ordinary case.” (Emphasis added)

67. In **Paragon Finance PLC v D B Thakerar & Co 1999 1 ALL ER 400**, the Court stated of fraud:

“It is well established that fraud must be distinctly alleged and also distinctly proved, and that if the facts pleaded are consistent with innocence it is not open to the court to find fraud. An allegation that the defendant ‘knew or ought to have known’ is not a clear and unequivocal allegation of actual knowledge and will not support a finding of fraud even if the court is satisfied that there was actual knowledge. An allegation that the defendant had actual knowledge of the existence of a fraud perpetrated by others and failed to disclose the fact to the victim is consistent with an inadvertent failure to make disclosure and is not a charge of fraud. It will not support a finding of fraud even if the court is satisfied that the failure to disclose was deliberate and dishonest. Where it is expressly alleged that such failure was negligent and in breach of a contractual obligation of disclosure, but not that it was deliberate and dishonest, there is no room for treating it as an allegation of fraud.”

68. In **Vijay Morjaria v Nansingh Madhusingh Darbar & another [2000] eKLR Tunoi JA** as he then was stated:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

69. In **Kinyanjui Kamau v George Kamau Njoroge [2015] eKLR** the Court of Appeal stated:

“.....It is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo v Ndolo (2008) 1 KLR (G&F) 742* wherein the Court stated that:

“...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases...”

In the particulars of fraud, the appellant alleged that he did not consent to the transfer of the property. We find this was not true; as pointed out by the courts below, the appellant had full knowledge of and consented to the transaction. The evidence of the chief (DW2) was instructive in this regard, as was a letter to the Land Registrar, Kiambu. This letter in particular shows that the appellant was fully aware of the transaction between the respondent and his deceased brother.

The evidence that was adduced by the Land Registrar seemed to indicate that there may have been some mischief in the manner that the title in favour of the respondent was procured. In his evidence, the Land Registrar indicated that the file in respect of the subject property could not be found, and as such, any transfer that may have been undertaken may have been fraudulent. In cases where fraud is alleged, it is not enough to simply infer fraud from the facts. In *Vijay Morjaria v Nansingh Madhusingh Darbar & another [2000] eKLR (Civil Appeal No. 106 of 2000) Tunoi JA* (as he then was) stated as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.” (Emphasis added)

70. The standard of proof having been set as a very high standard in law, it is not open to this court to merely infer fraud from the facts alleged by the Defendant.

71. The assertions of the defendant amount to this: That the Plaintiff supplied chemicals to it which did not meet their specification; that they requisitioned foliar fertilizers but what was supplied were products that were not fertilizers; that the goods did not correspond with the description demanded in terms of the Sale of Goods Act. As a result of this messy situation, they lost Kshs 110,000,000/=.

72. What was the evidence availed by the Defendant in this regard? In its Bundle of Documents the Defendant exhibited Reports on Analysis of Formulation Samples prepared by the KEPHIS Analytical Chemistry Laboratory. KEPHIS is the Kenya Plant Health Inspectorate Service. It is a Government entity whose responsibility is to assure the quality of agricultural inputs.

73. Each of the KEPHIS reports indicate that the results refer only to the sample availed at the laboratory. Dr. Samuel Were DW4 gave expert testimony based on these reports. His summary in his report was that:

a) The following foliar fertilizers analysed by KEPHIS on 28th November 2012, indicated adulteration or contamination with acaricides that affect growth of mites and ought not to have been in a plant nutrition product viz:

- Floxel 071207 in the report dated 5th December, 2012.
- Rosella fertilizer in the report dated 5th December, 2012.
- Napoleon B/No. 08810 in the report dated 14th December 2012.

b) Samples analysed by AGRIQ Laboratories in their report dated 6th December, 2012 namely:

- Clean All Foliar Feed - was detected to have a pesticide (fungicide).
- Napoleon Foliar Fertilizer - was found to contain a pesticide.

74. Dr. Were gleaned from the several reports all showing the defects and deficiencies of the sampled product based on the laboratory report of various reports availed to him by Mr. Kishan of Panda Flowers Limited.

75. In cross-examination, he said that his brief was to study the laboratory reports and give an expert opinion on them. He admitted that he did not communicate with the report makers; that he did not know how they got the samples, or who gave them to laboratories; and that he did not see the samples.

76. Most poignantly, he said that

“I would not be able to say anything on errors as they did not provide the sampling data and method used were not availed.”

He further stated that he did not get all the data and was uncertain whether samples were interfered with:

“I cannot say yes or no to interference with the product at the time of analysis. If a matter is contested between parties, it is evidently best for both to be involved. It would eliminate bias if both parties were there. The reports of analysis were only from Panda.” (Emphasis supplied)

77. Dr. Were was hard pressed to say whether the fertilizers affected the Defendant’s crop. He said:

“I do not know how Panda grow their plants or when they do their applications. The age of the crop was not given nor were there analysis reports on all chemicals used by Panda.....

As a specialist when you do application you stagger it. You do not apply all foliar fertilizers at the same time. These are applied in stages. That way it is possible to understand the effect of a foliar fertilizer. I was not provided with the crop history record.” (Emphasis supplied)

78. The evidence of Dr. Were can be summarized as follows, that: there was no way of knowing that the product tested emanated from the Plaintiff; the chain of custody could not be ascertained because both parties were not involved in the testing; that bias or interference in sampling could not be ruled out, if only one party was involved; that where many different products were being used on the crops, the effect of a particular product on the crops is difficult to ascertain without information on the crop age, husbandry and crop history. Dr. Were did not testify as to any tests or analyses he himself did. He relied on reports and results of others who were not called to give evidence. It was, essentially, and ultimately hearsay.

79. DW3 Anthony Wanjau’s expert evidence concerned the effects of some of the products tested on the occupational health and safety of

workers. He, too, was presented by the Defendant with the reports of results from KEPHIS. He, too, said he relied on the KEPHIS Results; that he did not interact with the officers who made the reports. His evidence did not aid the Defendant's pursuit of the fraud claims.

80. DW4 Igal Elfezouty in cross-examination confirmed that it is normal for different chemicals to be used for flowers depending on need. When shown the KEPHIS Results he admitted of the products:

“the manufacture date is 2007 and expiry is 2010. Tests were done in 2012. The product was analysed when the product had expired. The products were stored in my house as I took possession from the stores.....During 60% of the time I am away, no one can interfere with the products because I keep the only key.....I tried to involve Hangzhou in the early years but they refused.”

81. When the dispute between the parties concerning the quality of the products broke out, it appears that both parties without notifying the other, silently conducted tests of product samples. The Plaintiff exhibited at pages 83 to 86 four reports - all dated 12th September, 2011 - of Certificates of Analysis by the Pest Control Products Board (PCPB). That Board is registered under Cap 346 Laws of Kenya. Its mandate is to regulate the importation, exportation, manufacture, distribution and use of products used for the control of pests and the organic use of plants and animals.

82. The four PCPB Certificates show that all samples were received by them in March 2009 and analysed on 6th July, 2009. The results were as follows:

Sample A70/11	Green Sea Fertilizer	No pesticide detected
Sample A71/11	Clear All Fertilizer	No pesticide detected
Sample A72/11	Napoleon Fertilizer	No pesticide detected
Sample A70/11	Hummer Foliar Fertilizer	No pesticide detected

83. With regard to sample A73/11 Hummer Foliar Fertilizer, both the dates of manufacture and expiry were concealed, and so was the batch number. With regard to the other samples the date of manufacture was indicated as follows:

A70/11 Manufacture date 7th May 2008 Expiry date 7th May, 2012.

A71/11 Manufacture date 24th January 2008 Expiry date 24th January 2008 11.

A72/11 Manufacture date 8th January 2008 Expiry date 8th January 2008 11.

Thus, for the latter two samples the expiry date is inexplicable. No witness from the PCPB was called to shed light on these results.

84. The sampling shows that distrust between the parties had reached levels where they were unable to work together to address the problem of the quality of the products, resulting in each carrying out their own tests. The outcome was that the samples submitted individually by each party to different laboratories produced entirely opposite results.

85. From all the above evidence, I am unable to make a concrete finding that the product was adulterated. There are a number of reasons for this finding. First, the test samples appear to be too small as to be representative of the entire purchased product. Second, there is no assurance that the samples were not interfered with at any stage; thirdly, that the veracity of the testing cannot be ascertained where, as in this case, it was done by a sole party without involvement of the other; Fourth, there was no evidence to confirm that Panda sought to involve the Plaintiff and that the Plaintiff declined to participate in joint testing - such effort would have shown good faith in attempting to identify the real problem with the product; Fifthly, the tests appear to have been done in respect of product which had already expired; its shelf life of three years having lapsed, it is impossible to determine whether the product was contaminated by the time of testing; Sixthly, there was no record availed of the husbandry or plant maintenance of the Defendant's case to enable a determination to be made that the product was responsible for the decline in production.

86. In addition to all the above, I have not been availed with any agreement or communication forming an agreement between the parties as to the goods requisitioned, their specifications or their quantum or price. I am therefore unable to accept the Defendant's argument, on balance of probability, that the goods sold to them were adulterated, fraudulently supplied, or below standard. The evidence availed ought to have been cogent and obtained by a sufficiently inclusive method so as not to fail the test of authenticity and acceptability when sought to be verified.

87. The Plaintiff cited the case of **Belfast Millers v Ruaraka Ducks Ltd [2019] eKLR** where Nzioka J said, and I agree with her, that:

“Be that as it were, several issues arise: Firstly, the samples that were taken to KBS were taken from the Defendant's and not the Plaintiff's premises. Secondly, the plaintiff was not notified of the drawing of the sample, and was therefore not part of the same, so as to confirm that the feeds that were subjected to the forensic analysis were beyond doubt, those supplied by the Plaintiff. Thirdly, the witness who examined the same told the court that, he received the samples from another employee of Kenya Burau of Standards, that employee identified as “Caro” was not called to testify. See technical report by Karokor Kodii not called as witness (page 8). Therefore it was not in vain, that the Plaintiff argues that, the feeds tested did not come from its company. It

would have been in order to examine feeds found both by the Defendant's and Plaintiff's premises.

Even more so, if the Defendants kept records of feeds supplied by the Plaintiff, the production thereof at the time of taking the sample and/or matching of the sample to the records and/or the batch number would be indicative that the sample extracted were taken from the bulky supplied. Indeed, the evidence of the witness who extracted the sample was critical. That link is missing. As a result it is not conclusive, that the sample of the feeds extracted and tested was from the bulk supplied by the Plaintiff. (Emphasis added)

88. In addition, there was the problem posed by the Plaintiffs that the Defendant did not call a witness from KEPHIS. I think it is imperative, where a party is relying on an expert report such as a laboratory report or analysis for the party relying on the report to call the maker or someone authorized in their behalf, in their official capacity to prepare and make the report to be called to testify. That person will be able to explain any discrepancies or deficiencies in the report and place a proper context thereon. For example, he will be able to explain how samples tested were brought to them, by who and why; the nature and scope of the tests carried out; the issues surrounding whether the sample had expired or not, and any effects arising if they had expired; how the chain of custody was maintained; how the sample relates to the bulk of the product, and so on. In the absence of such a person, the laboratory report may be treated as merely expert hearsay until tested or the maker is interrogated through cross-examination.

89. I am now able to reach a firm conclusion on this issue. The evidence availed is insufficient to prove fraud, adulteration or low standards of the product particularly where, as in the present case, there is no evidence of what the contractual specifications were: No contract between the parties was exhibited; there was no assertion that the sale was by sample; or by description. The terms of the requisition and sale are nowhere in writing.

90. The court did, however, stumble upon one Local Purchase Order No. 013172 at Page 28 of the Plaintiff's Bundle. It is dated 6th October, 2008. The products requisitioned are Clean All 240 litres and Ugano (Ridomil) 20 litres. It is impossible to tell whether the product in this Local Purchase Order was part of any of the sampled and tested products. That Local Purchase Order is the only evidence of a requisition contract between the parties, and it is a sale by name description only. That may have been the pattern of the entire contractual relationship between the parties, but that cannot be ascertained from the evidence.

91. Ultimately, the court concludes that there is insufficient evidence to prove the Plaintiff's claim of product adulteration, supply, or sub-standard products or fraudulent supply of products.

92. This finding is not to be construed to mean that there was nothing wrong with the product, or to give a stamp of approval as to the quality of the product. All it means is that, there was no clear proof of a defective product fraudulently sold.

Whether the Defendant suffered loss of Kshs 110,000,000/= and is entitled to compensation by way of special damages equivalent thereof

93. **Section 107** of the **Evidence Act** provides that whoever alleges must prove, or shoulder the burden of proof. As part of the process of proving any such allegations a party may provide documentary evidence which may include accounts analysis. See **Section 37** of the **Evidence Act** provides:

“Entries in books of account regularly kept in the course of business are admissible whenever they refer to a matter into which the court has to inquire, but such statements shall not alone be sufficient evidence to charge any person with liability.”

94. In **Five Continents Ltd v Mpata Investments Ltd [2003] eKLR** the Court of Appeal stated:

“The plaintiff mainly relied on the accounts analysis to show the defendant's indebtedness. That accounts analysis was apparently prepared by the plaintiff for use in this suit. It is not itself a book of account regularly kept in the course of business. Even if it were, such a statement would not alone be sufficient evidence to charge the defendant with liability (see Section 37 of the Evidence Act). It follows that the accounts analysis on which the learned judge relied has no evidential value. (Emphasis added)

95. The Defendants claim for Kshs 110,000,000/= was founded on the proposition that the product supplied by the Plaintiff was sub-standard, harmful, not in accord with specification and fraudulently supplied. For that, the Defendant alleges it was entitled to special damages. The Court has not found that there was fraud or substandard products.

96. Even if the court were wrong and there was negligence or breach of contract on the part of the Plaintiff would the defendant have been entitled to the special damages sought?

97. The Defendant's case for damages was built up by availing financial reports and graphs to show the effect of the breach on the Defendant's production, sales and returns. The reports were supplied by DW1 Kishan Iyengar. Although he supported the financial reports, DW4 Igal Elfezonaty made a telling statement when he said in cross-examination:

“It is not possible to directly pinpoint the chemicals to the loss, you have to make an inference. (Emphasis added)

98. That statement discloses the difficulty any party will face when it asserts through analysed documents that the cause of a financial loss to it as a company was an event that occurred in one of the processes of its entire production chain.

99. In this case, the financial reports and information availed by DW1 Kishan Iyengar to prove the special damages and losses suffered by the Defendant were put together by him. In his testimony he said:

“I have carefully gone through the financial records of the defendant for the period in issue in this case. I have painstakingly gone through the records and made an effort to simplify the same for visual purposes by reducing the information to graphical representation. The graphics clearly indicate the defendant was doing gradually very badly for the period that coincidentally was the period the defendant was using the products from the plaintiff. Am not a production expert but I can confidently draw a nexus between negative financial growth and the use of products of the plaintiff.” (Emphasis added)

100. The Defendant then exhibited at Page 54 - 62 of the Defendant’s Bundle, nine tables and charts which had been created from the alleged raw records of the company.

101. He however did not avail the raw records to enable the court to verify that the summaries and graphs he produced were supported by the concrete financial data of the company.

102. In summary, the graphical representations show that the company’s

- Profits dropped from Kshs 66 million in 2008 to a loss of Kshs 106 million in 2011.
- Chemical purchases from Plaintiff rose from Shs 11.4 million in 2007 to 57.3 million in 2008.
- Sales of flower stems remained steady at between Kshs 56 million in 2007 to 60 million in 2010.
- Flower sales remained steady from Kshs 591.5 million in 2007 to Kshs 609 million and Kshs 527 million in 2009 and 2010. In 2008 sales were Kshs 672 Million.

There is, however, no correlation demonstrated between the figures and the alleged injury from the Plaintiff’s product.

103. In cross-examination, DW1 made the following stark admissions:

“Between 2007 - 2008 we were not using Hangzhou chemical products only. We used chemicals/fertilizers from other suppliers.”

“I did not capture the various products used for various crops.”

“My report is annual. It does not identify the effect of each product used.”

“During 2007 - 2009 there was no depression and Panda did not suffer any depression related losses.”

“2007 was the first time we used Hangzhou products. They supplied us for roughly two years.”

104. DW1’s evidence above does not help at all in proving that the company suffered drastic and monumental losses of Kshs 10,000,000/= as alleged.

105. In order to prove losses suffered by a company or decline in production and sales, it must produce audited annual accounts and reports which are the statutorily accepted mode by which a company officially and formally reports on its operations and upon which its taxes are paid. Audited accounts that are supported by other forensic reports, studies or tests formally commissioned under a clear mandate will give added support towards proving such losses. In the absence of these, the evidence of losses hangs by a thread.

106. The court also notes that, in its final submissions, the Defendant did not make any argument in support of the counter claim for special damages of Kshs 110,000,000/= to be paid to it.

107. Accordingly, the Defendant’s counter-claim for Kshs 110,000,000/= remains wholly unproved and fails.

Conclusion

108. In light of all the foregoing considerations, I come to the following conclusions

109. As to whether the Plaintiff supplied chemical products to the defendants worth Kshs 35,307,900 during the period August to December, 2008 the evidence availed is inconclusive. Products were definitely supplied but their value is unproved. There was definitely no evidence showing that products worth Kshs 35,307,900/= were supplied between August and December 2008.

110. As to whether there was a credit limit of sixty (60) days applicable for the supply of product resulting in the Plaintiff owing Kshs 35,307,900/=, the Court found there was no proof of any credit arrangement.

111. As to whether the Plaintiff supplied goods of sub-standard and adulterated quality to the Defendants, the answer is that there being no specifications, there was inadequate proof of special damages.

112. As to whether the Defendant suffered loss of Kshs 110,000,000/= in special damages, the answer is that there was no proof thereof.

Disposition

113. In the result, the Court disposes of the claim and counterclaim as follows:

a) The Plaintiff's claim for Kshs 35,307,900/= having not been proved on balance of probabilities is hereby dismissed.

b) The Defendant's counterclaim for Kshs 110,000,000/= having not been proved is also hereby dismissed.

114. Both parties having been unsuccessful, each party will bear its own costs.

Administrative Directions

115. Due to the current inhibitions on movement nationally, and in keeping with social distancing requirements decreed by the state due to the Corona-virus pandemic, this Judgment has been rendered through Teams tele-conference with the consent of the parties noted hereunder, who were also able to participate in the conference. Accordingly, a signed copy of this judgment shall be scanned and availed to the parties and relevant authorities as evidence of the delivery thereof, with the High Court seal duly affixed thereon by the Executive Officer, Naivasha.

116. A printout of the parties' written consent to the delivery of this judgment shall be retained as part of the record of the Court.

117. Orders accordingly.

Dated and Delivered in Naivasha by teleconference this 24th Day of May, 2021.

R. MWONGO

JUDGE

Attendance list at video/teleconference:

1. Mr. Opiyo for the Plaintiff
2. Mr. Gachiengo for the Defendant
3. Court Assistant - Quinter Ogutu