



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. 388 OF 2015

BOLLORE AFRICA LOGISTICS KENYA LIMITED.....PLAINTIFF

VERSUS

DELUXE FRUITS LIMITED.....DEFENDANT

JUDGMENT

1. The Plaintiff's case against the defendant is enumerated in its Plaint dated 23rd July 2015. Its case is that vide an application dated 22nd May 2014, the defendant applied to it for credit facilities. Further, following the said application, vide a letter of offer dated 24th June 2014, the Plaintiff granted the defendant credit facilities to the tune of **Kshs. 4,000,000/=** subject to the terms and conditions stipulated in the said letter. The said terms are: -

a. that the credit facility would be effective from 24th June 2014 to 31st December 2014;

*b. that the credit facility shall not exceed **Kshs. 4,000,000/=** and any amount above the said sum would be payable immediately by the defendant;*

c. that invoices raised by the Plaintiff shall be payable 30 days from the date of the invoice;

d. that any late payment would accrue a charge of 3% interest per month which rate will be compounded on the outstanding amount until settlement in full and lastly,

e. that the defendant shall be liable for all costs incurred towards the recovery of any outstanding amount.

2. The Plaintiff avers that the defendant's directors accepted the above terms by signing the letter of offer thereby giving rise to an agreement between the parties and thereafter the Plaintiff extended air and sea freight services to the defendant at the defendant's request and instance. The Plaintiff states that the defendant made several payments for the said services but subsequently in breach of the aforesaid terms, it defaulted in payment as a consequence the account fell into arrears to the tune of **Kshs. 8,038,77.41** and **USD 114,059.56** as at 14th July 2015 which amount continues to attract interests as herein above stated. The Plaintiff avers that as on 25th November 2014, the defendant admitted the debt by stating that it owed the Plaintiff **Kshs. 9,000,000/=** which it proposed to settle by paying **Kshs. 1,000,000/=** in December 2014, and **Kshs. 2,000,000/=** per month from January 2015 to April 2015. The Plaintiff avers that despite the above proposal, the defendant failed to settle the said sum which remains unpaid despite demand and notice of intention to sue.

3. As a consequence of the foregoing, the Plaintiff prays for judgment against the defendant for **Kshs. 8,038,766.41** and **USD 114,059.56** being the outstanding amount due and owing from the defendant as at 14th July 2015 aggregating to **Kshs. 19,444,722.41**. It also prays for interests on the said sum compounded at the rate of 3% per month as per the contract until payment in full. Further, the Plaintiff prays for charges and expenses incurred on a full indemnity basis plus interests at court rates. Lastly, the Plaintiff prays for costs of the suit and interests thereon at court rates from the date of filing this suit until payment in full.

4. The defendant filed a Statement of Defense dated on 23rd October 2015 through the firm of I. N. Nyaribo & Co advocates denying the Plaintiff's claim and pleading that the suit be dismissed with costs. In its reply to defense dated 16th November 2015, the Plaintiff joined issues with the averments in the defense and reiterated that the defendant admitted the Plaintiff's claim following negotiations between the parties.

5. Vide an application dated 9th February 2017, the defendant's advocate applied for leave to cease acting for the defendant. The application was allowed on 26th July 2017. Despite being served with a Hearing Notice, the defendant did not attend the hearing. Hearing proceeded *ex parte* on 18th May 2021.

6. Mr. Benjamin Kunuthia Nganga, an employee of the Plaintiff testified on behalf of the Plaintiff. His evidence was a replica of the averments in the Plaintiff; hence, it will add no value to rehash the same here.

7. The Plaintiff's counsel submitted that defendant failed to tender evidence, either oral or documentary in support of its case. He cited *Leo Investment Limited v Mau West Limited & Another* [1] in support of the proposition that where a party files pleadings but fails to tender evidence in support thereof, the pleadings remain unsubstantiated allegations. He argued that considering that the defendant never tendered evidence, and in view of the fact that it admitted the debt, the Plaintiff's claim remains unchallenged. As a consequence, he argued that the Plaintiff is entitled to judgment as prayed in the Plaintiff.

8. To succeed in a case of this nature, the Plaintiff is required to prove the following: - (a) The existence of a contract; (b) Performance by the plaintiff or some justification for non-performance; (c) Failure to perform the contract by the defendant; and, (d) Resulting damages/loss to the plaintiff.

9. The first and most-defining element of a breach of contract claim is the existence of a contract – whether oral contract or written. In the instant case there is a document dated 22nd May 2014 entitled Application for Credit Facilities. It is signed by the defendants' directors applying for credit facilities from the Plaintiff. The terms and conditions are stipulated therein. The Plaintiff issued them with a letter of offer dated 24th May 2014 which also stipulated terms and conditions for the facility. The defendant accepted the terms by signing a copy of the letter. This brought into existence a legally binding contract.

10. The other element is performance. On record are numerous correspondence/documents/invoices attesting to the fact that the services were rendered to the defendant as per the contract. This confirms that the Plaintiff performed its part of the contract. It was a term of the contract that the defendant would pay for the said services. There are unpaid invoices to the tune of the amounts claimed suggesting non-payment by the defendant which constitutes breach of contract on the part of the defendant. Lastly, as a result of the non-payment in breach of the contract, the defendant suffered loss. However, I am not satisfied that the claim for charges and expenses incurred on a full indemnity basis has been proved.

11. I am persuaded that the defense filed is a mere denial. In any event the defendant never attended court to tender evidence. I also find that the agreement provided for interests at the rate of 3% per month in the event of default. Also, I note that on 25th November 2014, the defendant admitted the debt and stated that it owes the Plaintiff **Kshs. 9,000,000/=** which it proposed to pay as follows: - Kshs. 1,000,000/= in December 2014 and Kshs. 2,000,000/= per month from January 2015 to April 2015. Despite admitting the debt, the defendant failed to pay.

12. I find and hold that the Plaintiff has on a balance of probabilities established its case against the defendant to the required standard. Consequently, I find and hold that the Plaintiff's claim against the defendant succeeds to the extent stated below. Accordingly, I enter judgment in favour of the Plaintiff against the defendant as follows: -

a. Judgment be and is hereby entered in favour of the Plaintiff against the defendant for Kshs. 8,038,766.41 and USD 114,059.56 (being the amount due to the Plaintiff from the defendant as at 14th July 2015) aggregating to Kshs. 19,444,722.41.

b. Interest on (a) above at the agreed contractual rate of 3% per annum until payment in full.

c. Costs of the suit plus interests thereon at court rates from date of taxation.

Orders accordingly

Signed, dated and delivered via e-mail at **Nairobi** this 17th day of **August** 2021

John M. Mativo

Judge

[1] {2019} e KLR.