IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

COMM CASE NO. E028 OF 2020

BETWEEN

PALM OIL TRANSPORTES LIMITED.....PLAINTIFF

AND

KENFREIGHT E.A. LIMITED.....DEFENDANT

RULING

Introduction and Background

1. By a Road Carriage Agreement dated 15th March 2011 ("the Agreement"), the Defendant engaged the Plaintiff to transport several consignments of Robusta Coffee to/from various destinations including Kampala, Uganda and to/from the Port of Mombasa, Kenya between 2011 and 2019.

2. The Plaintiff claims that the Defendant failed to make payments for some consignments in accordance with the terms set out in the Agreement and has approached the court by the Plaint dated 6th February 2020 demanding the sum of USD 309,247.32 and KES 174,000.00 plus interest at court rates.

3. The Plaintiff has filed the Notice of Motion dated 30th November 2020 under **Order 13 rule 2** of the ***Civil Procedure Rules*** ("the ***Rules"***) seeking judgment on admission against the Defendant for USD 199,600.00 together with interest from 26th June 2019 until payment in full. The application is supported by the grounds set out on its face together with the supporting affidavit of Mehari Kefela, a director of the Plaintiff, sworn on 30th November 2020. The Defendant opposes the application through the replying affidavit of its Finance Manager, Lemmy Kimanthi sworn on 18th December 2020. The parties filed written submissions in support of their respective positions.

The Application

4. The Plaintiff's case is grounded on the fact that between 16th May 2019 and 26th June 2019, the Defendant issued cheques in settlement of the amounts owed but the cheques were dishonored by the bank for lack of funds and others were stopped by the Defendant contrary to the provisions of the Agreement. The Plaintiff submits that the Defendant has not denied issuing the subject cheques and that this act of issuing those cheques for payment of the services rendered under the Agreement amounts to an admission of the sums indicated on the cheques. It urges that in light this admission, the Defendant is well and truly indebted and the Plaintiff is entitled to judgment for USD 199,600.00.

5. The Plaintiff relies on **section 43** of the ***Bills of Exchange Act*** **(Chapter 27 of the Laws of Kenya)** which gives the payee an immediate right of recourse against the drawer of a dishonoured cheque. It also cites several cases; ***Equatorial Commercial Bank v Wilfred Nyasim Oroko*** **[2015] eKLR,** ***Modern Distributors Vs Ndungu Njeru t/a Ndungu Njeru Filling Station*** **[2006] eKLR,** ***Thammo Holdings Limited v Timothy Mwaniki Muriithi*** **[2012]eKLR** and ***Maimuna Mohammed (suing as the Legal Representative of the late Stephen Maina Kariuki) v Kenya Bus Services*** **[2004] eKLR** where our courts have consistently held that a dishonoured cheque is an admission of liability on the part of the issuer and that the payee acquires an immediate right of recourse against the drawer for the recovery of the money the moment the cheque is dishonoured.

6. The Plaintiff therefore submits that it is entitled to judgment based on the Defendant's clear and unequivocal admission.

The Defendant's Reply.

7. The Defendant, in the replying affidavit, disputes the Plaintiff's claim. The Defendant depones that during their business relationship, it issued payments to the Plaintiff in satisfaction of the Agreement. However, between on 16th January 2019 and 17th July 2019, it was alerted of the possibility of alleged theft by different consignees during that period.

8. The Defendant further states despite the initial alert of the alleged theft, it still issued post-dated cheques dated 24th April 2019 to the Plaintiff and by which time only four containers had been identified with the alleged theft. That it still made good its payments out of respect of the business relationship and good faith as the loss was still minimal and it had no reason to suspect that the Plaintiff was in breach of contract at the time. However, the Defendant contends that by 30th May 2019, the loss of the Robusta Coffee had escalated, and an additional two containers had reported thefts and consequently, the Defendant's account was charged and debited by the Consignees/Customers due to the claim cases as the consignments reached their destination with a shortage of the Robusta coffee bags which also resulted in the Defendant being forced to pay taxes for the lost bags.

9. As a result of the Consignees/Customers charging and debiting the Defendant's account, the Defendant lacked sufficient funds to satisfy Cheque Nos. 345772, 345768, 345771, 345769, 345770, 345767 and by the Defendant's own intervention, the cheques were re-presented. The Defendant contends that out of good faith and contrary to the Plaintiff's allegation of the dishonoured cheques dated 16th May 2019 and returned on 21st May 2019 namely No. 345767, 345768, 345769, 345770, 345771 and 345772, the same were re-banked on 22nd May 2019 and were honoured.

10. The Defendant states that by 17th July 2019, all the ten containers had reported thefts which prompted the Defendant to stop the payment of Cheque Nos 345779, 345780, 345781, 345782, 345786 and 345787. It also engaged Loss Adjustors to ascertain the loss and liability. Thereafter and through an email dated 29th August 2019, it informed the Plaintiff of the final overview of the pending claim between it and the Defendant and stated the difference in favour of the Plaintiff amounted to USD 94, 948.45. It further notified the Plaintiff that it would be improper and irregular to make payment until the loss and liability is ascertained as the Plaintiff would have been unjustly enriched.

11. In sum, the Defendant does not deny owing the Plaintiff the debt at the time of issuing the cheques. It contends that it stopped payments since the outstanding account would have dropped below what the Defendant was incurring losses on. The Defendant rejects the claim that the dishonoured cheques amount to USD 199,600.00 as claimed by the Plaintiff and reiterates that six cheques were honoured leaving a difference of USD 149,100.00 which is still disputed for the reasons outlined above.

12. The Defendant submits that the Plaintiff has breached the fundamental and essential term of the Agreement, which is to safely deliver the consignments to the Consignees. It contends that the Plaintiff's application is brought in order to avoid its liability. It maintains that it has raised prima facie triable issues which entitles it to defend the claim.

Analysis and Determination

13. The issue for determination is whether the Plaintiff is entitled to judgment on admission for the USD 199,600.00. Judgment on admission is grounded under **Order 13 Rule 2** of the ***Rules*** which provides as follows:

> *Any party may at any stage of a suit, where admission of facts has been made, either on the pleadings or otherwise, apply to the court for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the court may upon such application make such order, or give such judgment, as the court may think just.*

14. The general principle is that the court will only enter judgment on admission in cases where the admission either on the pleading or evidence is plain and clear (see ***Denis Costello Doyle & another v Diamond Trust Bank (K) Ltd & another*** **NRB CA Civil Appeal No. 62 of 2007[2018]eKLR and** ***Choitram v Nazari*** **[1984] KLR 327**).

15. The Plaintiff hinges its case on **section 43** of the ***Bills of Exchange Act*** and argues that the Defendant's dishonoured cheques amounted to an automatic admission of liability and it matters little the purpose for which the cheques had been issued in the first place. The Defendant, on its part, states that in as much as it issued the said cheques to the Plaintiff, they were post-dated and some were recalled due to alleged theft of the consignments. In its deposition, the Defendant produced correspondence raising this issue with the Plaintiff and stating that it is only indebted to the Plaintiff in the sum USD 94,948.45 and KES. 1,300,040.00 after taking into account the missing consignments and debit notes received by the Defendant from the clients.

16. From the totality of the evidence, the amount claimed by the Plaintiff is largely disputed although the Defendant admits that it owes some amount. Thus, in as much as the Defendant issued cheques to the Plaintiff, which ordinarily would have amounted to an automatic admission of indebtedness and entitled the Plaintiff to a judgment, the same were discounted and the debt was disputed the moment the Defendant discovered and alleged theft of the consignments on the Plaintiff's part. I am in agreement with the decision of the Court of Appeal for Eastern Africa when dealing with **section 30** of the ***Bills of Exchange Act (Tanzania)*** which is in *pari materia* with our **section 30(2)** of the Bills of ***Exchange Act*** in the case of ***Hassanah Issa & Co v Jeraj Produce Store*** **[1967] EA 55** when it held that:

> *[I]n this case in as much as the suit was upon a cheque and in as much as the cheque was admittedly given, the onus was then on the defendant to show some good reason why the plaintiff was not entitled to have judgment upon the cheque admittedly given for the figure set out in that cheque. This position stems from Section 30 of the Bill of Exchange Act (Ch 215); which provides that the holder of a bill is prima facie deemed to be a holder in due course; but if an action on the bill is admitted or proved that the issue is affected with duress or illegality, then the burden of proof is shifted unless certain events, which are irrelevant for this purpose, take place. The position is therefore that where there is a suit on a cheque and the cheque was admittedly been given the onus is on the*

defendant to show circumstances which disentitle the plaintiff to a judgment to which otherwise he would be entitled. [Emphasis mine]

17. From the aforesaid decision, it is clear that although issuing of a dishonoured cheque amounts to an admission, the defendant is entitled to show facts that would disentitle the plaintiff to judgment. I find and hold that the Defendant has been able to demonstrate why the Plaintiff is not entitled to a judgment based on the cheque Nos 345779, 345780, 345781, 345782, 345786 and 345787. The Defendant has however made express admissions not only in the replying affidavit but also in the correspondence it has produced. There is an email dated 29th August 2019 from the Defendant to the Plaintiff in which the Defendant admits that it owes USD 94,948.45. In a letter dated 16th September 2019 addressed to the Plaintiff's advocates, the Defendant admits to owing USD 94,948.45 and KES. 1,300,040.00 and promises to pay in five installments. Finally, in a letter dated 19th December 2019 addressed to the Plaintiff, the Defendant admits that it owes and it is committed to paying USD 95,200.00 and KES 1,214,400.00 in instalments between 27th September 2019 and 4th November 2019.

Conclusion and Disposition

18. While I find that the Defendant has set out a bona fide defence why judgment on admission should not be entered on the entirety of the cheques, it has expressly admitted its indebtedness on account of part of the monies covered by those cheques. It is in that respect and to that extent that I will enter judgment.

19. I therefore allow the Plaintiff's application dated 30th November 2020 and order as follows:

(a) Judgment on admission be and is hereby entered for the Plaintiff against the Defendant for USD 94,948.45 and Kshs. 1,300,040.00.

(b) The balance of the claim shall proceed to trial.

(c) The Defendant shall bear the costs of the application.

DATED and **DELIVERED** at **NAIROBI** this **13th day of AUGUST 2021.**

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango

Mr Ondati instructed by Ahmednasir, Abdikadir and Company Advocates for the Plaintiff

Ms Wanjiru instructed by Bryant and Associates Advocates for the Defendant.