



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 152 OF 2015

MOHAMMED SALEH HASSAN.....PLAINTIFF

VERSUS

FEISAL JAMA t/a KENUGA ENTERPRISE.....DEFENDANT

JUDGMENT

1. By a plaint dated 12.11.2015 but later amended on the 15.12.2017, the plaintiff sought to recover from the defendant the sum of **Kshs 9,841,529** on account of some **Kshs 2,957,000** being balance of purchase price for trucks and **Kshs 6,884,529** together with contractual interest calculated at 15% pa being **Kshs 1,650,000**

2. The dispute is pleaded to have arisen and concerned two agreements between the parties. The first agreement was one by which the parties agreed that the plaintiff would import and sell to the defendant three used ex UK trucks whose price the defendant would pay in installments but with interests at 15%pa. That agreement was dated 3.1.2012. Pursuant to that agreement, the plaintiff did deliver to the defendant two trucks at a price and consideration of Kshs 11,000,000. In attempts towards payment of the purchase price, the defendant drew several cheques in plaintiff's favour but such cheques were returned unpaid and dishonoured. On account of the purchase price for the trucks the plaintiff claims the sum of Kshs 2,957,000 as outstanding.

3. The second agreement was one by which the plaintiff guaranteed the defendants borrowing from ECO-BANK , Mombasa Branch, in the sum of kshs 10,000,000 which guarantee was recalled by the bank , when the defendant defaulted on the repayments, on the 6.6.2014 when the bank recovered the sum of Kshs 6,884,529 from the plaintiff's account to settle the defendant's indebtedness.

4. I support of the claim in the plaint was filed a bundle of documents and witness statements by the plaintiff and one Ahmed Mohamed Noor. The list of documents included, the agreement of sale of trucks, a proforma invoice, cheque return advices, bundle of cheques issued by the defendant, logbook for motor vehicle KBS 347B and a certificate of roadworthiness.

5. The witness statement by the plaintiff was very brief on the details of the dealings while that by the witness was to the effect that he introduced the two, would be sent by the defendant to borrow money from the plaintiff and that the plaintiff did import three vehicle two of which were sold to the defendant while the witness bought one. It was also asserted that he intervened several times for the defendant to pay the debt without success and lastly that he knew that the plaintiff did not owe the defendant any money.

6. In resisting the plaint, a statement of defence was filed on the 9.12.2015 in which the existence and execution of the agreement for sale of trucks was admitted save that it was contended that the same was vague for failure to disclose the purchase price and that the same was frustrated by the plaintiff. It was then pleaded on a without prejudice basis that between 2012 and 2015, the defendant paid to the plaintiff the sum of Kshs 16, 800,000 which sum the plaintiff was yet to account for vis a vis the trucks and that in filling this claim the plaintiff was seeking to unjustly enrich himself. The defendant however denied that the plaintiff ever guaranteed any loan in his favour and the fact that the plaintiff was made to pay his indebtedness to eco-bank ltd. It was then asserted that the suit was incompetent and its dismissal was sought.

7. To buttress the defence , the defendant filed one witness statement and a list of some four documents including, the agreement for sale, the invoice issued by the plaintiff, statements of the defendant's accounts and a bundle of six cheques issued by the plaintiff to the defendant. The agreement and the invoice are actually copies of the same documents as filed by the plaintiff. In the witness statement like in the defence, the agreement is admitted together with the fact that the two trucks were sold at Kshs 11,000,000 and that upon taking delivery, he commenced payment and did pay by cheques and cash during the period between 24th May 2012 and 20th October 2014. It is further contended and added that when there were insufficient funds, the defendant would request the plaintiff not to bank issued cheques but the plaintiff would proceed and bank same and that there were times that it was represented that a cheque had bounced when it had been paid a scenario that led to an overpayment of Kshs 16, 800,000 which overpayment was subjected to a reconciliation which revealed actual overpayment of kshs 5,800,000 for which the plaintiff issued cheques Number 500325-500330 aggregating Kshs 5,000,000 but with a request that the same be not banked. The defendant then added that in good faith he kept the cheque without banking and when he threatened

to bank same the plaintiff lodged the current claim against him. That statement makes no mention at all about the guarantee and the claimed payment by the plaintiff to the bank.

8. Before hearing commenced, the court formed the opinion that the dispute was largely one on accounts and directed the parties to appoint an auditor to work on the books and file a report in court. Pursuant to such directions, an audit report was filed in court on 22.06.2017 which determines the issue of accounts.

9. When the hearing commenced, the plaintiff testified and called one witness then closed his case before the defendant also testified and closed own case

Plaintiff's case

10. In terms of the case conference directions, the plaintiff and his witness adopted their witness statements and produced the documents filed as PEXH 1-7 and notified the court that he would call the person who introduced the defendant to him as a witness. In cross-examination, he conceded that even though the agreement was for three trucks, he indeed imported four, but only sold two to the defendant and that he was in fact paid a sum of **Kshs 8,043,000** leaving an outstanding sum of **kshs 2,957,000**. On the cheques he gave to the defendant, he said such cheques were to assist and did assist the defendant obtain a facility of **Kshs 3,000,000** from chase bank but was never a payment to the defendant for any refunds. He said that once the facility was obtained the cheques were returned to him. He insisted on having paid **Kshs 6,884,529** on account of the defendant and that the claim was not an afterthought.

11. The evidence by PW2 in the witness statement adopted as evidence in chief was to the effect that he introduced the defendant to the plaintiff and that he knew the debt situation between the two including the fact that in attempts to pay the debt the defendant gave cheques some of which were dishonoured with a conclusion that the defendant, to his knowledge owe the plaintiff some money.

12. In reexamination, the witness insisted that the defendant indeed owed him the sum and that before coming to court they agreed on the sum and he was issued with cheques at pages 54-70 of the audit report. He denied the agreement to have been subject to sharia law but civil and that the payment to the bank was confirmed by the bank in a letter whose copy he gave to the defendant.

Defendant's case

13. The only evidence tendered was the personal testimony of the defendant as recorded in the witness statement filed and adopted as evidence in chief together with the list of document filed and produced as exhibits. The gist of that evidence is to the effect that he indeed bought two trucks from the plaintiff at the price pleaded and disclosed in the agreement. The defendant acknowledged the finding by the auditor in the mutually commissioned audit report that he owed the plaintiff the sum claimed in the plaint. He confirmed that some of the cheques he issued were returned unpaid but admitted having availed evidence on what the value of the dishonoured cheques was.

14. When taken through his exhibits, the defendant conceded that the schedule of payment of kshs 10,800,000 included two cheques which were in fact dishonoured. He made a further concession that even though the schedule showed payment of kshs 1,000,000 by cheque drawn on NIC bank, the bank statement did not show that and he had no document to evidence such payment. On the cheque given to him totaling kshs 5,000,000, he confirmed that he did not have the originals and was surprised the plaintiff's counsel had the originals. The last and most critical concession made was that he did not dispute the content of a letter from ECOBANK Ltd to the effect that the plaintiff paid to his account Kshs 6,884,529.

15. When asked questions by the court on the schedule of payments produced by him, he said that he could not insist on the truth and accuracy thereof and that there was no evidence to show he transported any goods for the plaintiff at the cost disclosed in the schedule save for the plaintiff's computation. He however insisted that the cheques given to him by the plaintiff was for refund of overpayment to the plaintiff.

16. With such evidence, the defence case was closed and parties were then directed to file and exchange submissions. The plaintiffs submissions are dated 3.07.2017 and filed on 04.07.2018 with further response to the defendants submissions filed on the 25.01.2019. For the defendant submissions were filed on 17.01.2019.

17. Even though the court directed parties to agree, settle and file agreed issues, no agreed issues was filed save that the plaintiff filed own issues on 02.02.2017. The list sets out 10 issues which I consider not to be issues derivable from the pleadings on record. I so say because issues listed as No.2, 3, 5 & 10 were matter pleaded and not contested by either side. What is not contested is not an issue for court's determination. Since there are no issues settled by consent of the parties, the duty now rests upon the court to isolate such issues.

18. In executing the mandate to isolating issues from non-issues, I do not that the claim is a straight one and is about money due and owing. With such view in mind I do find the following to be the issues for determination by the court:-

- i) Of the purchase price of Kshs 11,000,000, how much was paid by the defendant and how much could be outstanding?
- ii) How much of the contractual interest is due for payment to the plaintiff?
- iii) What orders should be made as to costs?

19. In coming to those have had the benefit of reading the pleadings filed, the proceedings taken, including trial directions given on 30.11.2016, and the submissions offered, both written and oral. Those records show that the agreement for sale of trucks and the price thereof is not in dispute. Even the guarantee given to eco-bank and payment to the said bank upon the defendants default is also not in contention.

That payment to eco-bank cannot be in contention because of one clear reason. That reason is that even though the plaintiff made an explicit pleading in that regard with the defendant putting a general traverse, in his witness statement, which became the evidence in chief, nothing was said to rebut the plaintiff's position but in cross examination, the defendant in his own words acknowledged the payment. He said:-

“I can see the letter dated 6.6.2014 from eco-bank which says the plaintiff paid to the bank Kshs 6,884,529. I don't dispute that fact.”

Analysis and determination

20. In determining the three issues, the court revisits its directions on the 9.5.2017, pursuant to which parties appointed Ms Waweru Kimathi & Associates, certified Public Accountants, which firm filed a report dated 14th June 2017. On the 17.07.2017 when parties attended court to comment on the report, Mr Ngure for the defendant sought for an adjournment to enable him take instruction on 'the sum found to be due by the auditor out of the purchase price. However the next time the matter was in court, it was adjourned because the plaintiff had filed an application to amend the plaint. Thereafter no mention was made of the report time witnesses commented and relied on same at the trial. Those comments however did not challenge the propriety or accuracy of the report but the defendant did confirm what the report says about his indebtedness.

21. I take the report to be a joint exhibit by an expert appointed by the parties on the status of accounts between them made with the joint and mutual mandate and that this being a purely accounting dispute, the report settles the entire dispute as far as the indebtedness between the parties is concerned. While I remind myself that that report is for all purposes an opinion and evidence that ought not triumph over all other evidence[1], it is of note that in this case the report was a joint one between the parties and there has not been anything to controvert it. I also appreciate the position of the law that an expert report ought to be *given only appropriate weight. The opinion must be as influential in the overall decision-making process as it deserves; no more, no less. The weight to be given to expert evidence will derive from how that evidence is assessed in the context of all other evidence. In this matter the expert evidence was needed because the evaluation of the issues requires technical knowledge that only an expert in the field of accounts was likely to possess*[2]. Having been so rendered nothing was availed in challenge. I have on my own studied the report and its annexure which I find to be common documents between the parties, and I find it not only persuasive and cogent in its conclusion but equally in line with the evidence led by both sides. The evidence on record present a common ground that parties dealt as pleaded in the plaint, business accommodation was offered and there was a default by the defendant to meet his contractual obligations to the plaintiff.

22. The only matter that would have demanded a further investigation by court is the pleading and assertion that there had been overpayment by the defendant. However, in evidence and the documents produced, there was no substance to prove that assertion.

23. Based on that report and the evidence in general, I do find that the plaintiff is entitled to the entry of judgment in the sum of Kshs 11,491,529.

24. Judgment is therefore entered for the plaintiff against the defendant in the sum of **Kshs 11,491,529** together with costs and interests at the contractual rate of 15%pa from the date of the suit till payment in full.

Dated, signed and delivered this 30th day of April 2020

P J O Otieno

Judge

[1] **Kimatu Mbuvi T/A Kimatu Mbuvi & Bros vs. Augustine Munyao Kioko Civil Appeal No. 203 of 2001 [2007] 1 EA 139**

[2] **Stephen Kinini Wang'ondu v The Ark Limited [2016] eKLR**