THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 172 OF 2004

BAMBURI CEMENT LIMITED.....PLAINTIFF

-VERSUS-

FURNCON LIMITED.....DEFENDANT

JUDGMENT

1. This suit is brought by the plaintiff against the defendant vide a plaint dated 21st June 2004, and filed In court on the 7th July 2004 the plaintiff is seeking judgment to be entered in their favour in the sum of **Kshs.5,272, 795.00** plus costs of and incidental to this suit and interest on the amount owed and on costs at courts rates.

2. The Defendant filed its defence on the **30th April 2010** Amended on the **6th July 2015** and filed together with a counter-claim, which prays for the following orders:

a. Dismissal of the Plaintiff with costs;

b. Special damage of Kshs.54,885237/=;

c. Interest on the amount of the Counter Claim at Court rates from the date of filing the Counter-Claim until payment therefore in full;

d. Costs of and incidental to the Counter-Claim;

e. Any such other or further relief as this honourable court may deem appropriate to grant.

3. The plaintiff filed a reply to the amended Defence and defence to counterclaim on the **16th July 2015** and averred in the main that the counterclaim was time barred. The parties complied with the requirements of the Civil Procedure Rules by filing their documents and witnesses statements and consequently the suit was set down for hearing.

Plaintiff's Evidence

4. The plaintiff's case was laid before court by its PW1 Ms. **Lynette Kiyeng** who adopted her witness statement that was filed in court on the **30th August 2013** and referred to list and bundle of documents filed in court on the **30th August 2016.** In a nutshell, the plaintiff relied on the invoices, total deliveries, and advice notes duly signed on behalf of the Defendant.

5. In cross-examination by Mr. Nyongesa, PW1 confirmed that its exhibit 4 was an analysis of unpaid cheques for **kshs.4, 722,000.** No copies and bank paying slips were attached. She further stated that the three cheques were stopped by the drawer and the sum claimed of **Kshs.5,272, 795.00** comprised of the outstanding sum for delivery and the value of the dishonoured cheques. She added that the analysis sheet showed the dates of delivery, motor vehicles that picked the cement and the outstanding balance.

6. PW1 further confirmed that before any supplies were made there had to have been cash or a bank guarantee and in this case the defendant enjoyed a bank guarantee from Kenya commercial bank of kshs.1,500,000/=. The prices for retail were set by the plaintiff but the same would differ depending on a distributors geographical location and whether the goods were delivered ex-factory or if delivered to a distributor. The plaintiff invoiced for cement and transport because the delivery was not ex-factory.

Defendant's Evidence

7. The Defendant's case can be derived from its **DW1** Mr. **Solomon Kiore** the Defendant's Managing Director. He adopted his statement dated **27th October 2015** that was filed in court on the **4th November 2015** and the defendant's bundle of documents filed in court on the **24th November 2015** listing 12 documents.

8. He testified that, by a letter dated **30th March 1996,** the defendant was appointed as a distributor pursuant to distribution agreement duly signed. He said that the defendant used to collect the cement from the Plaintiff factory and the price of sale of the cement was fixed by the plaintiff. It was also the defendant's testimony that the plaintiff required a distributor to have trucks, a warehouse, a trading license and other trade facilities and the payment terms were either by cash or via a bank guarantee.

9. The Defendant admitted that they stopped payment of the cheques to the plaintiff because they discovered the plaintiff was under invoicing other distributors at its expense and in breach of the distribution agreement. The Defendant then instructed Kinyori and Associates, a financial expert to calculate its losses because of under invoicing. The financial expert arrived at a figure of **kshs.9,521,001/=**. with regard to loss as a result of under invoicing and loss of business by abuse of the distributorship agreement was set at **Kshs,45,364,236/=** making an aggregate of **Kshs.54,885,237** which is the amount claimed in the counter-claim.

10. It is the Defendant's testimony that the debt being claimed by the plaintiff exceeded the bank guarantee in place and that the plaintiff owed the defendant transport costs.

11. In cross-examination by **Mr. Gitonga,** DW1 admitted unequivocally that the defendant does not dispute that cement was indeed supplied and the amount being claimed was indeed outstanding. He averred that the debt arose since the parties were negotiating to have the plaintiff credit the accumulated transport rebate in favour of the admitted debt. It is also admitted that the Defendant issued cheques no. **366400,367090,367780** and **368360**, which were payment for the cement supplied but the same, were later stopped and only one cheque was cleared.

12. The defendant in cross-examination went on to admit that after stopping the payment of the above stated cheques as at **16th February 1998,** they went ahead and uplifted cement worth **kshs.1,494,715/=** making the total of the amount owed to **kshs.6,217,315/=**out of which the bank paid **kshs**.**944,520/=** leaving a balance of **kshs.5,272,795/=**which remains unpaid to date.

13. The defendant confirmed that its complaint is that it was given bad terms and on that basis it filed a counter-claim since it is because of the Plaintiff's underhand dealings with the other transporters/distributors that made the defendant become bankrupt. Further, it was stated that the plaintiff subsequently reduced the prices of cement because of the bad roads that increased the transportation costs after complaints by the defendant.

ANALYSIS AND DETERMINATION.

14. I have considered the pleadings, the documents filed together with written submissions and the authorities cited, and consider the following to be the issues for determination.

a. Whether the plaintiff claim and defendant counterclaim are time barred

b. Whether the distributorship agreement was frustrated or vitiated by fraud

c. Whether the Defendant proved its counter-claim

d. Whether the defendant owes the plaintiff a sum of kshs.5, 272,795/= in respect of cement supplied.

<u>Whether the plaintiff claim and defendant counterclaim are time barred</u>

15. Since the issue of limitation is a jurisdiction issue, before this court embarks on dealing with any other issue for determination, it needs determine, preliminarily, whether the Plaintiff's suit and the defendant's counter claim are statutorily time barred. Section 4 of the limitation of Actions Act provides that actions based on contract may not be brought after

16. The first distributorship agreement was made on the 30th May 1996 while the second distributorship agreement between the plaintiff and the defendant was entered into on the **21st July 1997** and was for a period of one year. In this suit the accrual of the cause action is not to be reckoned from the date of the agreement but the date on which the act complained about did occur. I consider the plaintiff to complain that having supplied the products to the defendant, payment was not effected as covenanted. Accordingly for the plaintiff suit, the cause accrued when the obligation to pay was not met. On the reasoning, the cause pleaded by the defendant in the counter claim could only arise on the date the defendant contends the plaintiff breached or frustrated the agreement between the parties. In coming to this conclusion I am persuaded by the holding by Judge Majanja, in **Joseph Odira Ombok v South Nyanza Sugar Company Ltd [2018] eKLR** where the court said:-

> **"I adopt the position taken in *South Nyanza Sugar Company Limited v Diskson Aoro Owuor*** (Supra) **in determining when the cause of action accrues. According to *Black's Law Dictionary (10th Edition)* the word *"accrue"* means *"to come into existence as an enforceable claim or right."* Thus under the outgrowers cane agreement, such as the one subject to the suit, the right to sue could only arise when the respondent failed to harvest the plant crop. This is when the cause of action accrued and when, in terms of** section 4(1)(a) **of the *LAA*, the time begins to run".**

17. In adopting such formula for computation of time, I do note that the four cheques numbers 000052; 143538; 000149 and 000148, were

banked on the 2.2.1998; 5, 2.1998; 9.2.1998 and 10.2.1998 respectively and stopped on the 11th of February 1998. It is my finding that any cause of action to be founded on the stopped cheques accrued on the 11.2.1998. Thereafter one the delivery was taken of goods worth Kshs kshs.1, 494,715/= on the 16.2.1998. The contract between the parties was that payment was against the delivery or bank guarantee. Based on such terms of the agreement, payment for that delivery was due on the 16.2.1998 when the Defendant uplifted 26 tons of cement. I do therefore find that the cause of action on the value of the cheques accrued on the 11.02.1998 when the Defendant instructions to stop the last cheque were effected by the bank while, that for the last delivery was on 16.2.1998. Calculating the period of six years from that date, the latest time the suit could have been filed was on the 11.2.2004 for the accrued cheques and 16.02.2004 for the last delivery. Accordingly, when it was filed in July 2004, the cause had become barred. The suit was thus filed out of time and the same is therefore struck out for being time barred

Whether the Counter-Claim is time barred

18. The Defendant in its counterclaim did not plead when it discovered the fraud however the same can be discerned from the defendant's letter dated 14th February 1998 at paragraph 3 of the letter where the issue of rebates to some distributors arose for the first time. The law is that a counter-claim dates back to the date of the claim. Section 35 of the Limitation of Actions Act provides as follows:

> **"For the purposes of this Act and any other written law relating to the limitation of actions, any claim by way of set-off or counterclaim is taken to be a separate action and to have been commenced on the same date as the action in which the set-off or counterclaim is pleaded**."

19. In **JOHN NANDUKULE OMUKUBA v NIMESH P. SHAH BHIMJI [2008] eKLR** the Court in upholding the counterclaim held as follows:

> **"Section 35 in my view makes it very clear that a counter claim may be filed in the claim where it is pleaded and in so doing the opposite party cannot raise a defence of limitation. I am therefore of the view that the defendant's counter claim hereof is not time barred."**

20. Having found the Plaintiff's claim to be time barred and being guided by the reasoning in **John Nandukule Omukuba V Nimesh P. Shah Bhimji** (supra), I hold that the Defendant counterclaim is equally Statute barred and must suffer the same fate the plaintiff's suit has suffered. The counter claim stands struck out.

Whether the distributorship agreement was frustrated or vitiated by fraud.

21. I would have stopped at the juncture I have dismissed the claim and counter-claim, but owing to the fact that parties have labored to address the court on the counter-claim, substantially, I deem it necessary to determine whether or not the counter-claim would be merited if not for the time bar.

22. The plaintiff's suit is founded upon the complaint that his competitors were given more favourable terms and therefore he was unable to compete and was frustrated out of the business. The conduct the counter-claimant calls underhand dealings with other distributors and involving under-invoicing would only be relevant and compelling had the said counterclaimant proved that its contract with the defendant carried the similar terms like those by the other alleged distributors. No evidence was led in that line and I am unable to agree with the position in the absence of evidence. I am therefore unable to find that there was any frustration by the plaintiff of the contract

23. The other complaint by the counter-claimant was that the Plaintiff had fundamentally breached the terms of the contract and perpetuated fraud by defrauding the amounts for the VAT being a registered agent of VAT as against it. With such assertions, it was incumbent upon the Defendant by way of burden of proof to prove this fact by marshaling the necessary evidence to support its case. The burden of proof to prove fraud lay on the Defendant. In ***Central Bank of Kenya Ltd v Trust Bank Ltd & 4 Others*** **NAI Civil Appeal No. 215 of 1996(UR),** the Court of Appeal, in considering the standard of proof required where fraud is alleged stated that;

> **"The Appellant has made vague and very general allegations of fraud against the Respondent. 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 Civil Case.**

24. Similarly in ***Rosemary Wanjiku Murithi v George Maina Ndinwa*** **NYR Civil Appeal No. 9 of 2014 [2014] eKLR**, the Court of Appeal held that;

> **"Proof of fraud involves questions of fact. Simply raising the issue of fraud in a statement of defence and counterclaim is not proof of fraud".**

25. It is my view and holding that the defendant has not demonstrated how the plaintiff has varied the terms of their agreement and neither has the defendant led any evidence to show *coercion, fraud, or undue influence* so as to warrant this court's intervention to stop the enforcement of the said contract. The Defendant in support of its allegation of underhand dealings (under invoicing) with other distributors has annexed invoices, transport consignment notes and advice notes from Varsani Hardware limited and Mwirera Hardware and Animal feeds. From the documents relied on by the Defendant it can be deduced that there is some under-invoicing on the part of the plaintiff in favour of those distributors In fact, the Defendant avers that Mwirere Hardware and Animal feeds is just its neighbor in Githurai yet it received transport rebates but the defendant received none. As much as one would sympathize with the defendant on such disparity in invoicing, the fact remains that without the benefit on the terms of agreement with such other people. My reading of the distribution agreement exhibited has not revealed that there was a covenant by the plaintiff to invoice the plaintiff the same sum it would invoice others

even thought that would be the moral and reasonable expectation. Parties before me negotiated a contract and reduced same into writing. The law binds then to such bargain and none is allowed to resile therefrom on the basi8s that it is a bad bargain.

26. The principle of privity of contract and that on party autonomy come in to play in this instance. The Court of Appeal held as follows in **Civil Appeal No 95 of 1999 National Bank of Kenya Ltd –vs-Pipe Plastic Samkolit (K) Professor Samson K. Ongeri** (**Tunoi, Shah & Keiwua JJ A):-**

> **"…A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud, or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge."**

27. Similarly, In **Housing Finance Co. of Kenya Limited vs. Gilbert Kibe Njuguna Nairobi HCCC No. 1601 of 1999**, (**eKLR)** it was held:

> **"Parties only bind themselves by the terms contracted and executed and not anything else... Courts are not foras where parties indulging in varying terms of their agreements with others will get sanction to enforce the varied contracts. Contracts belong to the parties and they are at liberty to negotiate and even vary the terms as and when they choose and this they must do together and with meeting of the minds. If it appears to the Court that one party varied terms of the contract with another, without the knowledge, consent or otherwise of the other, and that other demonstrates that the contract did not permit such variation, the Court will say no to the enforcement of such contract."**

28. The essence of the privity rule is that only the people who actually negotiated a contract (who are privy to it) are entitled to enforce its terms. Even if a third party is mentioned in the contract, he cannot enforce any of its terms nor have any burdens from that contract enforced against him. It is expected, and I am prepared to take notice going by the reputation of the brand Bamburi Cement, that the plaintiff entered into various distribution agreements with various distributors and the Defendant's distribution agreement was just but one of the agreements entered into by the plaintiff.

29. It is also not disputed that the plaintiff fixed the retail prices of the cement depending on the location of the distributor. Therefore, in my view this meant that the contracts entered into the plaintiff and the distributors were unique in their own way and they were bound to vary depending on either party's bargaining prowess. The defendant could only rely on the terms of its contract and be bound by such but not be entitled to seek a benefit based on a contract to which it was not a party.

30. From the foregoing, I hold that the contract between the plaintiff and Mwirere Hardware(a third party) is protected by the doctrine of privity of contract and its terms cannot be relied on by the defendant in praying for the courts intervention to help it relieve itself from a bad bargain. The Court of Appeal In **National Bank of Kenya Ltd V Pipe Plastic Samkolit (K) Ltd and another (2002) EA 503** stated as follows:-

> **"This, in our view, is a serious misdirection on the part of the Learned Judge. A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud, or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud, or undue influence in regard to the terms of the clause. As was stated by Shah JA in the case of Fina Bank Ltd v Spares and Industries Ltd (2000) 1 EA 52: "It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity function to allow a party to escape from a bad bargain."**

31. Ultimately, even if I had not adjudged the counter-claim to be statute barred, I would still find and hold that the Defendant did not discharge it burden of proving fraud or frustration against the plaintiff. I find and hold that the Defendant's counter-claim for loss of earning fails, and is hereby dismissed

32. In cross-examination by **Mr. Gitonga** Counsel for the Plaintiff, DW1 who is a director of the defendant admitted that the defendant does not dispute cement was supplied and the amount being claimed. He averred that the debt arose because the parties were negotiating for the plaintiff to credit the transport rebate. The defendant further admitted that they had issued cheques no. **366400, 367090, 367780** and **368360** for payment of the cement supplied, but later stopped payments of the issued cheques, and as at **16th February 1998** the Defendant had uplifted goods worth **kshs.1, 494,715/=** making the total of the amount owed to **kshs.6, 217,315/=**out of which the bank (KCB) only paid the sum of **kshs.944, 520/=**on the strength of the guarantee it had leaving a balance of **kshs.5, 272,795/=**which remains unpaid to date.

33. Supply of cement and sum claimed by the plaintiff having been admitted, and had the court not adjudged the suit time barred, the Court would have founds that the Plaintiff had proved that it is owed the sum of Kshs. 5,272,795.00 and the same would have been awarded as prayed.

34. In the end both the suit and counter-claim are struck out but since both have failed on the point of law on limitation, I order that each party shall bear own costs

Dated and signed at Mombasa this 17th day of March, 2020.

P J O OTIENO

JUDGE

Signed and delivered at Mombasa this 23rd of April, 2020

E Ogola

JUDGE