



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL CASE NO. 457 OF 2015

JUMBO COMMODITIES LIMITED.....PLAINTIFF

- VERSUS -

FAHARI TRADING LIMITED.....1ST DEFENDANT

I & M BANK LIMITED.....2ND DEFENDANT

IMPERIAL BANK LIMITED.....3RD DEFENDANT

JUDGMENT

1. **Jumbo Commodities Limited**, the plaintiff is in the business of importing into Kenya and sale of large scale commodities such as sugar and rice. It sources those commodities locally and also internationally through importation.

2. The basic facts of this case are not entirely in dispute. The plaintiff entered into a contract with the 1st defendant **Fahari Trading Limited** (hereinafter referred to as Fahari) whereby Fahari was to import and supply long grain rice from Pakistan for supply to the plaintiff. Under the contract Fahari was to import and supply to the plaintiff of 75,000 bags each of 25 kg. The sale agreement between the parties was dated 7th April 2015. The pertinent conditions of that contract are:

a. The contract price Ksh 1,385 per bag, total Ksh 103,875,000

b. Payment was by avalised bill of exchange in Kenya Shillings.

3. Fahari supplied the plaintiff with a proforma invoice on 7th April 2015 for Ksh 103,875,000 and the plaintiff on that date drew a Bill of Exchange in the following terms:

BILL OF EXCHANGE

“For Ksh 103,875,000.00 Date: 7th April 2015

At 180 days of this Sole Bill of Exchange, please pay to the order of Imperial Bank Limited the sum of Kenya Shillings One Hundred and Three Million Eight Hundred Seventy Five Thousand only for value received.

Drawn under proforma Invoice No. FHR/0786 Dated 7th April 2015

To: For and on behalf of:

JUMBO COMMODITIES LIMITED FAHARI TRADING LIMITED

P.O. BOX 18734-00500 P. O. BOX 90217-80100

NAIROBI MOMBASA

SIGNED & STAMPED SIGNED & STAMPED”

That Bill of Exchange after signature by the plaintiff and Fahari was delivered to the plaintiff's banker, the 2nd defendant, **I & M Bank** (hereinafter I & M), and to Fahari's banker, the 3rd defendant, **Imperial Bank Limited** (hereinafter Imperial). The payment of that bill of exchange was guaranteed by I & M to Imperial.

4. By the date when this suit was filed 23rd September 2015 Fahari had only supplied the plaintiff with 15,366kg bags of rice for the value of Ksh 21,281,910. The plaintiff's witness, Piyush Mansukhlal, stated in evidence that Fahari was unable to deliver the balance of the consignment of rice whose value was Ksh 82,593,090. As result of Fahari failure to deliver that balance of the consignment Fahari and the plaintiff mutually agreed to cancel the contract. That agreement is as follows:

MUTUAL AND AMICABLE CANCELLATION OF CONTRACT BETWEEN JUMBO COMMODITIES LTD AND FAHARI TRADING LTD CONTRACT REF NO 0786 dated 7th April 2015

The buyer Jumbo Commodities Ltd & seller Fahari Trading Ltd have today mutually & amicably agreed that Contract REF 0786 dated 7th April 2015 shall be mutually revoked, cancelled as the said contract has come to a premature end for both the parties and both the Buyer and Seller have mutually settled all disputes peacefully.

That we have also jointly decided to instruct our bankers namely I & M Bank Ltd & Imperial Bank Ltd respectively that the said contract shall stand null & void & further we have no claims or liens against each other & the avalised Bill shall be withdrawn/cancelled by Jumbo Commodities Ltd after paying & clearing all the outstanding amount to Imperial Bank Ltd, Mombasa of Ksh 21,281,910.00(Kenya Shillings Twenty One Million, Two Hundred Eighty One Thousand, Nine Hundred & Ten Only)for 15,366 Bags supplied under the contract by Fahari Trading Ltd.”

5. The plaintiff's witness stated in evidence that the plaintiff by letter dated 12th June 2015, in compliance with the agreement of cancellation of the contract, informed I & M and instructed that bank to cancel the Bill of Exchange. I & M by its letter dated 27th June 2015 informed the plaintiff that the remitting bank, that is Imperial, had declined to cancel the subject bill. This is what I & M stated in that letter:

I&M Bank Limited

June 27,2015

Our Ref: FIBC/0475/2015

The Director,

Jumbo Commodities Ltd,

P.O. Box 18734-00500,

Nairobi, Kenya

Dear Customer,

RE: CANCELLATION/WITHDRAWAL OF AVALISATION BILL FOR PURCHASE OF RICE FOR KES 103,875,000.00

DRAWER: FAHARI TRADING LIMITED

We refer to your letter dated June 12th 2015 in which you had requested for withdrawal of avalisation of subject documentary collection.

We wish to inform you that the remitting bank has declined to cancel the avalisation for the subject bill.

Therefore, the bill remains avalised and will be due for payment on October 7th 2015

Kindly provide us with your further instructions.

Assuring you of our best service at all times.

6. That letter was the catalyst to the institution of this suit. This court on 21st December 2015 granted the plaintiff an interlocutory injunction restraining I & M from debiting the plaintiff's bank account to pay to Imperial the sum of Ksh 103,875,000 in connection with avalised Bill of Exchange dated 7th april 2015.

7. At hearing of this case Fahari, although it had filed its defence, failed to adduce evidence because its witness failed to attend court. Accordingly, its defence was not proved and remained mere allegation. See the case of Shaneebal Limited v County Government of Machakos (2018) eKLR where it was held:

“In Janet Kaphiphe Ouma & Another vs. Marie Stopes International (Kenya) Kisumu HCCC No. 68 of 2007 Ali-Aroni, J. citing the decision in Edward Muriga Through Stanley Muriga vs. Nathaniel D. Schulter Civil Appeal No. 23 of 1997 held that:

“In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations...Sections 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same by way of evidence”.

28. Similarly in the case of *Interchemie EA Limited vs. Nakuru Veterinary Centre Limited Nairobi (Milimani) HCCC No. 165B of 2000, Mbaluto, J. held that where no witness is called on behalf of the defendant, the evidence tendered on behalf of the plaintiff stands uncontroverted.*

29. If one is still in doubt as to the legal position reference could be made to the case of *Drappery Empire vs. The Attorney General Nairobi HCCC No. 2666 of 1996* where *Rawal, J* (as she then was) held that where the circumstances leading to the deliveries of goods are not challenged and stand uncontroverted due to the failure by the defendant to adduce evidence, the standard of proof in civil cases (on the balance of probabilities) has been attained by the plaintiff.”

8. Imperial filed a defence on 11th November 2019, which was out of the requisite period and, without leave of the court. Imperial therefore could not adduce evidence because it had no valid defence on record.

9. It follows that this case was undefended by Fahari and Imperial.

10. I & M called evidence through its witness Jackson Maithya Kinyungu one of its managers. This witness confirmed the evidence of the plaintiff that I & M received from the plaintiff the sale contract dated 7th April 2015 between the plaintiff and Fahari. Payment under that contract was through avalised bill of exchange. The avalised bill was accompanied by proforma invoice. I & M confirmed avalization and irrevocably undertook to pay Imperial on maturity of that bill. The witness confirmed that it received on 12th June 2015 a letter from the plaintiff which stated that the plaintiff and Fahari had cancelled/withdrawn the avalised bill. He further stated that Imperial, as the remitting bank, declined to cancel the avalization. I & M however confirmed remitting, on behalf of the plaintiff, to Fahari as instructed by the plaintiff Ksh 21,281,910.00 the value of the rice supplied by Fahari to the plaintiff.

ANALYSIS

11. Although the plaintiff, in its written submissions formulated five issues for determination I believe that only two issues need to be considered. Firstly, the court needs to determine whether it can intervene to prevent I & M from discharging its obligation to pay Imperial on the avalised bill of exchange. The second issue is: which party should bear the costs of the suit.

12. Section 3 of the Bill of Exchange Act defines a bill as:

3.(1) A bill of exchange is an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to or to the order of a specified person or to bearer.

13. There is no doubt that the avalised bill, in this case, fits the definition in Section 3 above.

14. The plaintiff's case, which was uncontroverted because Fahari and Imperial did not give evidence, was that Fahari failed to honour its contract to the full extent, that is failed to supply the plaintiff rice as per contract, and after negotiations Fahari and the plaintiff agreed to cancel their contract for that supply of rice and agreed to inform their respective banks, I & M and Imperial, of that cancellation of the contract and of the cancellation of the avalised bill.

15. I & M's case is that it was informed of that cancelled contract and avalised bill by the plaintiff its client, and it also relayed that information to imperial. I & M's witness stated that since Imperial declined to cancel the avalised bill I & M was obligated under law to honour it on its maturity date in October 2015, unless the plaintiff could show that Feharis stand was motivated by fraud, misrepresentation or deliberate suppression of material facts. The general principle is that the courts will allow banks to honour the bill of exchange except in clear cases of fraud which the bank has notice of. Therefore, the court will normally leave the merchants to settle their dispute as provided in their contract but will not interfere with the banks obligation to pay for the bill of exchange. See the case *R.D. HARBOTTLE (Mercantile) LIMITED V NATIONAL WESTMINSTER BANK LIMITED: 1978* as per Kerr J, it was held:-

“Except possibly in clear cases of fraud of which the banks have notice, the courts will leave the merchants to settle their disputes under the contracts by litigation or arbitration as available to them or stipulated in the contracts. The courts are not concerned with their difficulties to enforce such claims; those are risks which the merchants take. The machinery and commitments of banks are on a different level. They must be allowed to be honoured, free from interference by courts. Otherwise, trust in international commerce could be irreparably damaged.”

16. It is important to examine closely the actions of the parties in this case to determine the first issue. Fahari contracted to supply rice to the plaintiff. Parties entered into a written contract in April 2015. Fahari issued a proforma invoice and as agreed and the plaintiff issued a bill of exchange which was avalised or guaranteed by I & M to Imperial. Payment was due 180 days after the date of contract. Barely two months later, that is 60 days after contract, Fahari informed the plaintiff it was unable to supply the rice except a small quantity which had been supplied. The question that arises is did Fahari ever intend to fulfil the contract or was the plaintiff duped into issuing an avalised bill

of exchange for the benefit of Fahari. The plaintiff witness alleged fraud against Fahari and against Imperial. This is what that witness stated in evidence:

“We work on trust. Business is conducted on trust. We did this, all transaction keeping in mind we were working in good faith. Not knowing that Fahari Trading had other intentions of plotting to cause fraud or other things in his (sic) mind.”

The witness also stated thus in evidence:

“The reason we had to pay (sic) [bring] I & M as my bankers on board is to stop them from paying these monies because these are hard earned monies. And I cannot afford these losses or I cannot pay for supply of air which is just like these guys want to do something like what happened in NYS. The intention of Fahari Trading and Imperial Bank then (sic) what is said, they are just colluding together trying to take monies and advantage of things which they have not supplied.”

17. When that evidence sinks in one is left questioning whether the transaction between the plaintiff and Fahari was indeed above board. Did Fahari enter into a contract with the sole intention of never supplying the full consignment of rice represented by the avalised bill and on the other hand did Imperial, Fahari banker, play a role such as what the plaintiff called fraud likening it to notorious corruption cases that this country has experienced. I say this because it seems that it was never the intention of Fahari and Imperial to defend this case.

18. Fahari filed a defence to the plaintiff's claim and later sought and obtained leave to amend that defence to include a counter claim against the plaintiff of Ksh 53,631,508. Fahari did not file that amended defence as required by law but filed it 6 months after leave was obtained contrary to Order 8 Rule 6 of the Civil Procedure Rules. Accordingly, that amended defence was struck out by this court's Ruling of 20th September 2018 for having been filed out of time without leave of the court. It is noteworthy that Fahari has indeed shown scant interest in this case and no wonder that on the two days this case came for hearing there were flimsy reasons given by Fahari's advocate in seeking the adjournment of this case. The court declined to grant an adjournment.

19. But of greater concern is that Imperial did not file a defence as required in law and surreptitiously filed a defence when the case was part heard, without the leave of the court such a defence needless to state is not a defence on record.

20. When the avalised bill was issued to Imperial, Imperial granted Fahari, its client, financial facility on the strength of the avalised bill. See the replying affidavit of Joseph M. Maweu on behalf of Imperial dated 30th September 2015. Having granted that facility one cannot understand how the Imperial could fail to defend this suit. Is there more than meets the eye. Was it always the intention of Fahari not to supply the rice. Did Fahari then conceive an idea, perhaps with connivance of Imperial, to entrap the plaintiff to enter into contract with Fahari and Fahari to then use the avalised bill to get credit from Imperial. Imperial was assured of payment having obtained an avalized bill from I & M the plaintiff's bank. No wonder the plaintiff stated in evidence through its witness that, and I repeat:

“The intention of Fahari Trading and Imperial Bank....they are just colluding together trying to take monies and advantage of things which they have not supplied.”

21. That evidence was not contradicted by Fahari and Imperial. That evidence of the plaintiff casts aspersions on both Fahari and Imperial.

22. I am in every respect persuaded by a decision of Ontario High Court per Henry J in the case **Aspen Planners Ltd v Commerce Masonry and Farming Ltd et al; 1979 Can LII 1965 (ON SC)** when the learned judge discussed the principles governing performance bond or letter of credit then proceeded to state:

“To this general principle there is an exception in the case of what is called established or obvious fraud to the knowledge of the bank. The most illuminating case is of Sztejn v J Henry Schroder Banking Corpn (1941) 31 NY Supp 2d 631 at 633 which was heard in the New York Supreme Court in 1941. After citing many cases Shientag J said this:

"It is well established that a letter of credit is independent of the primary contract of sale between the buyer and the seller. The issuing bank agrees to pay upon presentation of documents, not goods. This rule is necessary to preserve the efficiency of the letter of credit as an instrument for the financing of trade."

He said that in that particular case it was different because

"... on the present motion, it must be assumed that the seller has intentionally failed to ship any goods ordered by the buyer. In such a situation, where the seller's fraud has been called to the bank's attention before the drafts and documents have been presented for payment, the principle of the independence of the bank's obligation under the letter of credit should not be extended to protect the unscrupulous seller."

That case shows that there is this exception to the strict rule; the bank ought not to pay under the credit if it knows that the documents are forged or that the request for payment is made fraudulently in circumstances when there is no right to payment. I would in this regard quote the words of Browne LJ in an unreported case when he was sitting at first instance. It is Bank Russo-Iran v Gordon Woodroffe & Co Ltd, [1972] The Times, 4th October. He said:

"In my judgment, if the documents are presented by the beneficiary himself, and are forged or fraudulent, the bank is entitled to refuse payment if the bank finds out before payment, and is entitled to recover the money as paid under a mistake of fact if it finds out after payment."

But as Kerr J said in this present case: "... in cases of obvious fraud to the knowledge of the banks, the courts may preclude banks from fulfilling their obligation to third parties."

23. I also state in this case that in view of the plaintiff's uncontroverted evidence stating that Fahari and Imperial weaved a web of fraud against it, I & M is entitled to refuse to make payment on the avalized bill. The plaintiff's case does succeed on that finding that the court, on the evidence before it, will intervene to prevent I & M from discharging its obligation to pay Imperial.

Costs

24. The plaintiff's costs of the suit are payable by Fahari and Imperial jointly and severally.

Other Issues

25. The plaintiff relied on the provisions of the **United Nations Convention on International Bills of Exchange and International Promissory Notes 1988**. That Convention at Article I states:

"This convention applies to an International bill of exchange (UNCITRAL CONVENTION)" and also contains in its text the words "International bill of exchange (UNCITRAL CONVENTION)."

The avalised bill of exchange in this case did not comply with Article 1 of that convention and accordingly the convention is not applicable to this case.

26. Imperial as stated before did not file a defence to this action nor did it adduce evidence. It follows that it erred in its written submission where it presented evidence through those submissions.

CONCLUSION

27. The judgment of the court is as follows:

a. An order of a Permanent Injunction is hereby issued restraining the Defendants jointly and severally, through their respective agents, servants and or employees, from presenting, paying, demanding payment, receiving payment or enjoying any benefit, appropriating and or disbursing any funds or in any way utilizing for business, the Bill of Exchange dated 7th April 2015 drawn on the plaintiff;

b. A declaration is hereby made that the Bill of Exchange dated 7th April 2015 drawn on the plaintiff in respect of supply of 75,000, 25kg bags of Rice at a price of Kshs 103,875,000/= is cancelled.

c. A permanent Injunction is hereby issued restraining the 2nd defendant, its agents, servants and or employees, from debiting the 1st Defendant's account (s) with the sum of Ksh 103,875,000/= or any part thereof in connection with payment of the Bill of Exchange dated 7th April 2015 and further from crediting the 1st Defendant's account with the 3rd Defendant Account Number 720001274 Mombasa Branch or any other account belonging to the 2nd Defendant;

d. A permanent Injunction is hereby issued restraining the 2nd Defendant from debiting the plaintiff's account(s) with the sum of ksh 103,875,000/= or any part thereof in connection with payment of the Bill of Exchange dated 7th April 2015 or any accrued interest thereof;

e. The plaintiff's costs shall be paid by the 1st and 3rd defendants jointly and severally.

f. The costs of the 2nd defendant shall be paid by the 1st and 3rd defendants jointly and severally

DATED, SIGNED and DELIVERED at NAIROBI this 18th day of JUNE 2020.

MARY KASANGO

JUDGE

Before Justice Mary Kasango

C/A Sophie

For the plaintiff:

For the 1st defendant:

For the 2nd defendant:

For the 3rd defendant:

ORDER

This decision is hereby virtually delivered this 18th day of **June, 2020**.

MARY KASANGO

JUDGE