



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

CIVIL SUIT NO. 678 OF 2003

NGONG HILLS SUPERMARKET LIMITED.....PLAINTIFF

VERSUS

BIDCO OIL REFINERIES LIMITED.....DEFENDANT

JUDGMENT

- 1. NGONG HILLS SUPERMARKET LIMITED** (hereafter the supermarket) has sued **BIDCO OIL REFINERIES LIMITED**. (hereafter BIDCO) seeking judgment for general damages for breach of contract, general damages for breach of fiduciary duties and unlawful interference with trade and business, general damages for loss of business and special damages of Ksh 12,734,206.95.
- 2. ROBERT KARARI KIMANI** (hereafter Kimani) testified on behalf of the Supermarket. He is the director of the supermarket. He stated in evidence that the supermarket operated both as a supermarket and wholesaler. It was selling various types of merchandise. It commenced business in 1996.
- Kimani said that BIDCO approached him in early part of the year 2001 and requested him to be a distributor of its oil products. The condition given to Kimani by BIDCO for that was that he was to cease selling any other company's oil products during the period of the distributorship. Further that he was given a lists of other conditions he was required to fulfil in order to distribute BIDCO's products. He stated that the supermarket met all those conditions and having done so the distribution agreement was signed by it and was given to BIDCO on 19th July 2001. Kimani was informed by BIDCO that the signed distribution agreement would be given to him once BIDCO executed their part. This was never to be given to him.
- On the following day after signing that distribution agreement BIDCO sent to the supermarket its products worth the value of Ksh 1.7 million. These products were sent to the supermarket by BIDCO without the supermarket making an order for them. Kimani stated that those oil products remained in the supermarkets' premises, up to when the distribution agreement was terminated. That the supermarket was unable to sell those products and they expired while they were at the supermarket.
- Kimani stated that when the supermarket proceeded to distribute those products in the territory provided in the distribution agreement the supermarket found that the outlets in that territory had been supplied with BIDCO's products and so the supermarket was unable to sell. The supermarket had under the distribution agreement a territory from Ngong to Buruburu and up to Karen. Kimani stated that BIDCO had supplied to the supermarket a list of customers that the supermarket could supply BIDCO's products within that territory. The supermarket however discovered that BIDCO was itself supplying products within the territory provided in the distribution agreement.
- Kimani further stated that BIDCO, in contravention of the distribution agreement would deliver invoices, to the supermarket, before the products were delivered. Further that, without notice of termination, BIDCO ceased making deliveries of products to the supermarket, from 13th December 2001 which left the supermarket's territory vulnerable to other distributors dumping BIDCO's products in its territory.
- Kimani stated that the stoppage by BIDCO to supply the supermarket with products adversely affected the supermarkets profitability, particularly the projected profit of Ksh 4 million per week.
- That despite those breaches on the part of BIDCO, BIDCO proceeded to bank the supermarket's blank cheques that the supermarket had left in BIDCO's possession and also called up the supermarket's bank guarantee.
- The evidence on behalf of BIDCO was adduced by **Maxwell Sande** (hereafter Sande). He confirmed that he was in the employment of BIDCO for 23 years. At the time of contracting with the supermarket he was working as the sales manager. When he testified before court he stated he had risen in rank and was BIDCO's Nairobi Regional Trade Marketer. He confirmed he was the one who was involved with the

process leading to the signing of the distribution agreement between BIDCO and the supermarket.

10. He confirmed that the supermarket had been a supplier of BIDCO'S products from 1996. During that time the supermarket received directly BIDCO products for sale to its customers. In the year 2001 BIDCO adopted a new trading system which was referred to as the "Hub System" which replaced the direct selling of BIDCO products. Because the supermarket had a good supply relationship with the BIDCO, BIDCO entered into a distribution contract of the "Hub system", where the supermarket was to distribute BIDCO's products to other supermarkets and other outlets in the areas of Karen, Embulbul, Ngong, Matasia and Kiserian. Sande however denied that the supermarket was the sole distributor under that agreement.

11. Sande stated that BIDCO lawfully terminated the distributorship agreement, with the supermarket because the supermarket failed to pay for products supplied to it by BIDCO.

ANALYSIS AND DETERMINATION

12. Having considered the parties' pleadings and the evidence adduced before court I find that there are only two issues requiring determination in this matter. They are:

- a. Which party breached the agreement and if so what orders should be made by the court.
- b. Which party shall bear the costs of this suit.

ISSUE (a)

13. The parties' relationship was governed by the distribution agreement. This is accepted by both parties, even though only the supermarket signed it.

14. The supermarket alleges that BIDCO was in breach of the agreement in that it continued to supply its products to shops within the territory that the supermarket was servicing. That BIDCO issued invoices to the supermarket before its products were supplied and sometimes delayed in delivery of those products and, that BIDCO terminated the agreement without notice. It is because of these alleged breaches that the supermarket prays for orders for damages.

15. BIDCO alleges that termination occurred when the supermarket issued cheques that were not honoured. Indeed, BIDCO submitted that the issuing of cheques that were dishonoured was a fundamental breach which entitled BIDCO to terminate the agreement.

16. The distribution agreement the territory clause provided:

"The Company (BIDCO) hereby grants to the Hub (the supermarket) the exclusive right during the continuance of this agreement to purchase for resale in the territory specified in the first schedule ("the Territory)...."

17. The first schedule in that agreement provided the following as the territory, to be serviced by the supermarket, that is: Karen, Ngong, Kiserian, Rongai and Bomas of Kenya.

18. The supermarket, through its director Kimani stated that it was unable to sell the products because it found that BIDCO, contrary to the agreement and in particular the territory clause, was supplying the very products it had contracted it to supply. Kimani supported this allegation by producing in evidence invoices of BIDCO issued to the Ongata Rongai Supermarket which represented products supplied by BIDCO after the distribution agreement was entered into.

19. It is obvious that after contracting with the supermarket and agreeing that the supermarket had exclusive territory to resell the products purchased from BIDCO that BIDCO continued to supply to shops within that territory. Kimani stated in evidence that BIDCO sold to shops known as Crisscross Ltd, Safeway hyper supermarket as well as Ongata Rongai Supermarkets. Although Kimani was cross examined on this evidence his testimony was not displaced. Much more Sande by his evidence did not deny that BIDCO supplied to Ongata Rongai Supermarket but sought to explain it away by saying that Ongata Rongai Supermarket declined to receive BIDCO's products from the supermarket. Mind you apart from his statement in evidence there was no documentary evidence of such refusal. I make a finding and hold therefore that BIDCO in supplying its products in the territory the supermarket was servicing was in breach of the agreement.

20. Kimani further stated that BIDCO sent to the supermarket its invoices before the merchandise was dispatched. That testimony by Kimani was not controverted by Sande. It follows that it was proved by Kimani's evidence that the invoices were sent earlier than the merchandise.

21. The clause, in the agreement, on payments provides that payment is due within 7 days from the date of receipt of invoices. BIDCO had in its possession the supermarkets signed blank cheques which it presented for payment in the month of December 2001. Kimani stated he stopped payment of those cheques because BIDCO was haphazardly supplying product to the supermarket and because BIDCO continued to supply products to shops that were within its territory. This is well captured in the letter written by Kimani to BIDCO dated 24th January 2002, thus:

"Since the sales target was never met, where some of the reasons were that you decided to continue selling products to some of the main customers who still enjoy credit period even after signing the agreement, and know (sic) that you are supplying the customers."

22. The above letter was not responded to by BIDCO.

23. In view of non-payment of the blank cheques held by BIDCO, BIDCO called-up for the bank guarantee it held as security in order to pay itself the amount of Ksh 1,914,011.54.

24. BIDCO has alleged it was entitled to treat the unpaid cheques of the supermarket as a fundamental breach of the agreement and that it was on that basis entitled to terminate the supply of its products to the supermarket.

25. That termination by BIDCO however was contrary to what is provided under the agreement. Termination under the agreement, even for non-payment or issuing of cheques that were not honoured, could only occur as provided under clause 10 of the agreement. By that clause termination could only occur after either party giving the other written notice of seven days. The agreement does not recognise the unilateral termination without notice as was done by BIDCO. BIDCO therefore was in breach of clause 10 of the agreement. When it ceased, as at 13th December 2001, to supply to the supermarket its products.

26. The supermarket has sought general damages for breach of the agreement. The principle on general damages where there has been breach of contract is as was stated in the case **Kenya Power & Lighting Company Ltd v Quentin Wambua t/a Bondoni wholesalers (2018) eKLR** thus:

“It is trite that for the plaintiff to be entitled to special damages, which loss of income is, the same must be specifically pleaded and strictly proved. This was the position in Peter Njuguna Joseph and EARS vs. Anna Moraa Civil Appeal number 23 of 1991, where it was held that:

“Special damages must be pleaded with particularity and must be strictly proved. Loss of income is special damages, which must be pleaded and proved.”

48. However, it was held in Nizar Virani T/A Kisumu Beach Resort vs. Phoenix of East Africa Assurance Company Limited [2004] 2 KLR 269, that:

“Whereas a claim for special damages should not only be pleaded but strictly proved what amounts to strict proof must depend on the circumstances that is to say, the character of the acts producing damage, and the circumstances under which those acts were done.”

27. There are however, exceptions to that general principles that damages cannot be awarded for breach of contract. The exceptions were recognised and applied by the court of appeal as discussed in the case **Delilah Kerubo Otiso v Ramesh Chander Ndingra [2018] eKLR** as follows:

“In Hadley v Baxendale (1854) 9. Exch. 341, the measure of damages is such as may be fairly and reasonably considered arising naturally from the breach itself or such as may be reasonably contemplated by the parties at the time the contract was made and a probable result of such breach. (See also Standard Chartered Bank Limited v Intercom Services Ltd & Others NRB - Civil Appeal No. 37 of 2003 (2004) eKLR). As a general principle, the purpose of damages for breach of contract is, subject to mitigation of loss, the plaintiff is to be put as far as possible in the same position he would have been if the breach complained of had not occurred. There is no doubt that in the circumstances of this case, the respondent did all he could to mitigate his loss; for instance, he discharged the charge and prepared the land control board consent forms for the appellant’s signature which the appellant frowned upon.

In our view, the appellant’s conduct was oppressive, highhanded, outrageous, callous and underhanded, to say the least. We could go further and suggest that what he was engaged in, bordered a fraud. The appellant from the word go never had the slightest intention of honouring the agreement.....

In the circumstances, general damages would be tenable in our view.”

28. What are the circumstances of this present case? My consideration of the evidence adduced in this case left me with the clear impression that BIDCO, through its employee, one Sande, ‘set up’ the supermarket for failure from the start of the operation of the distribution agreement. BIDCO began by requiring the supermarket do cease selling any other cooking oil products from any other supplier except that of BIDCO. Kimani in evidence stated until entering into the agreement with BIDCO the supermarket was selling a variety of other cooking oil products.

29. The second thing BIDCO did, to the detriment of the supermarket, was to continue to directly supply its products to the very shops that the supermarket was to supply under the agreement. This, as Kimani stated, did adversely affect the supermarket productivity.

30. Kimani stated, and it was not denied by BIDCO, that BIDCO failed to provide supplies as and when it ordered, exposing it to other distributors penetrating its territory.

31. Finally, I found that BIDCO issued invoices earlier than when the merchandise was supplied which undoubtedly exposed the supermarket to be liable to pay within 7 days of the invoice period even before reselling the products.

32. The supermarket was bombarded by defeatist circumstances, not of its own making, but of the making of BIDCO which no doubt eventually led to its failure. Kimani testified that the supermarket suffered financially and had to repay the guarantee which its banker honoured on request by BIDCO. One would wonder was it the intention of BIDCO to put the supermarket out of business by the actions it took. From this court's vantage point there does seem to be credibility in that point of view.

33. The supermarket called its accountant Fredrick Mungai Wainaina who was very inept. He produced his accounts but could not support any of the entries with the documents he relied upon. On being asked why he failed to provide those documents he retorted; "That was not my duty." This witness did not assist the case for the supermarket and the court is unable to rely on his accounts in determining the damages payable by BIDCO.

34. I have however considered that BIDCO breached the contract and by a series of actions led to the supermarket being unable to pay for products supplied. It was in my view a case of the dominant company, in this case BIDCO, taking advantage of a weak company, here the supermarket. The supermarket was used to 'dump' products on it, but then BIDCO supplied shops within the supermarket territory thereby denying the supermarket the opportunity to sell. That action leads me to find that BIDCO's conduct was '**oppressive, high handedness**' and that conduct takes it to the exception discussed in the case **Delilah Kerubo Otiso** (*supra*) above. The supermarket is entitled to general damages. In my view general damages of Ksh 5 million is fair and just in the circumstances.

ISSUE (b)

35. On costs of the suit I will be guided by the provisions of section 27 of the Civil Procedure Act that costs unless for good reason shall follow the event. In that regard, I am guided by the holding in the case **Delilah Kerubo Otiso v Ramesh** (*supra*) as follows:

"On the issue of cost, it's been held previously that costs are in the discretion of the trial court though the generally accepted principle is that costs follow the event, unless the court has good reason to order otherwise. The successful party will always have costs of his success, which is the case herein. In the case of Attorney General v Halal Meat Products Limited (2016) eKLR,

"Generally, costs ought to follow the event unless the court otherwise orders for good reasons. The Supreme Court in Jashbir Singh Rai & 3 Others -vs- Tarlochan Singh Rai & Others (2014) eKLR held,

'It is clear that there is no prescribed definition of any set of "good reasons" that will justify a Court's departure, in awarding costs, from the general rule, costs-follow-the-event. In the classic common law style, the Courts have proceeded on a case-by-case basis, to identify "good reasons" for such a departure.'

CONCLUSION

36. In the end the judgment of the court is as follows:

a. Judgment is hereby entered for the plaintiff for Ksh 5 million with interest at court rate from the date of filing suit until payment in full.

b. The plaintiff is awarded the costs of the suit.

DATED, SIGNED and DELIVERED at **NAIROBI** this **28th** day of **JULY** 2020.

MARY KASANGO

JUDGE

Before Justice Mary Kasango

C/A Sophie

For the plaintiff:

For the defendant:

ORDER

This decision is hereby virtually delivered this **28th** day of **July, 2020**.

MARY KASANGO

JUDGE