



IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL CASE NO. 251 OF 2009 CONSOLIDATED WITH CIVIL CASE NO. 368 OF 2009

BETWEEN

EAST AFRICAN PORTLAND CEMENT COMPANY LIMITED.....PLAINTIFF

AND

MERU MWANGAZA DISTRIBUTORS LIMITED.....DEFENDANT

JUDGMENT

Introduction

1. The Plaintiff, East African Portland Cement Company Limited (“EAPCC”), is a cement manufacturing company. At the time material to this suit it engaged the Defendant, Meru Mwangaza Distributors Limited (“the Defendant” or “Meru Mwangaza”), to distribute its products in accordance with a Distributorship Agreement dated 1st October 2006 and whose rights and obligations were subsumed by a Novation Agreement executed by the parties on 18th April 2008 (“the Agreement”). The parties filed two suits against each other which were consolidated.

HC COMM 368 of 2009 (Meru Mwangaza v EAPCC)

2. By Amended Plaint dated 29th July 2020, Meru Mwangaza sued EAPCC concerning the Agreement. Its claim was that as a condition of the Agreement, it provided a Performance Bond from Equity Bank to secure payment and pay on demand any amount that was due to EAPCC in event of breach of the Agreement.

3. Meru Mwangaza’s case is that in October 2008, EAPCC without lawful cause, refused it to transport cement from its factory and demanded Kshs. 2,386,200.00 from Equity Bank. Equity Bank paid out the amount. Meru Mwangaza therefore claimed Kshs. 2,386,200.00 together with Kshs. 32,048,242.00 being profits from the breach of the Agreement.

4. In its Amended Statement of Defence dated 11th August 2009, EAPCC admitted the Agreement. It confirmed that Meru Mwangaza provided a Performance Bond from Equity Bank valid from 21st January 2009 to 2nd January 2019 as a condition for the Agreement.

5. EAPCC contended that when Meru Mwangaza breached the Agreement, it issued a notice demanding

compliance in October 2008 in default of which it would call up the Performance Bond. When Meru Mwangaza failed to comply with the demand, it issued a notice dated 21st November 2008 to Equity Bank. Equity Bank honoured the demand by paying Kshs. 2,386,200.00 to EAPCC.

6. EAPCC further stated that after the Performance Bond was liquidated, it demanded a fresh Performance Bond to enable it continue with the Agreement but Meru Mwangaza failed to provide one. As provision of a Performance Bond was a condition under the Agreement, EAPCC stated that it could not allow Meru Mwangaza's vehicles to transport cement. Since it blamed Meru Mwangaza for breaching the Agreement, it denied the claim against it.

HC COMM 251 of 2009 (EAPCC v Meru Mwangaza)

7. By the plaint dated 25th March 2019, EAPCC sued Meru Mwangaza based on the Agreement for Kshs. 25,754,729.80 being sums due and outstanding on account of cement supplied on diverse days between August and December 2008 whose receipt was duly acknowledged by various delivery notes and which amount remained outstanding. EAPCC stated that despite demand, Meru Mwangaza failed to pay causing it to terminate the Agreement in February 2009.

8. Meru Mwangaza filed a Defence and Counterclaim dated 5th May 2009. It denied breach of the Agreement. It stated that the claim lacked particulars as EAPCC did not issue invoices in accordance with the Agreement. It stated that it wrote to EAPCC and informed it that there was a loss of cheques for certain deliveries amounting to Kshs. 20,822,670.00 as such it was a stranger to the claim and that the termination of the Agreement was unjustified.

9. In the Counterclaim, Meru Mwangaza stated that it provided two Guarantees in favour of EAPCC; one dated 6th December 2007 for Kshs. 12,000,000.00 provided by ABC Bank and another dated 18th March 2008 for Kshs. 30,000,000.00 provided by Equity Bank. That in breach of the Agreement, EAPCC called in both guarantees and utilized the proceeds to clear the purported indebtedness.

10. Meru Mwangaza prayed for the court to dismiss the claim by EAPCC. It therefore claimed Kshs. 54,924,173.00 made up as follows:

- a. Commissions under the Agreement from October 2008 to March 2009, at Kshs. 10/- per 50kg bag amounting to Kshs. 2,900,000.00
- b. Rebate from Kshs. 8,327,148.00 from April to October 2008.
- c. Refund of excess recovery from invoices from January to October 2008 amounting to Kshs. 554,395.00.
- d. Amount under the Agreement from January to October 2008 amounting to Kshs. 1,142,630.00.

The Proceedings

11. Both cases were consolidated and set down for hearing. When the matter came up for hearing on 20th January 2020, EAPCC did not attend court hence I dismissed its claim and proceeded with Meru Mwangaza's claim on 28th February 2020. Meru Mwangaza called its director, Mariam Guantai (PW 1), as its witness. She adopted her witness statements and bundle of documents filed in court. After the hearing, the parties filed written submissions.

The Testimony

12. PW 1 testified that under the Agreement, Meru Mwangaza was required to transport cement for EAPCC to various specified destinations at a fee which was agreed at Kshs. 2.00 per bag of cement for loading and off-loading as clarified by the EAPCC Managing Director in an e-mail dated 28th June 2008.

Under Agreement, Meru Mwangaza was entitled to a commission of Kshs. 10.00 per 50kg bag sold within the area of distribution. It was also entitled to transport payment depending on the destination but not less than Kshs. 100.00 per trip.

13. During the relationship, Meru Mwangaza raised complaints with EAPCC in a series of correspondence letters dated 26th May 2008, 25th June 2008, 23rd July 2008, 8th September 2008 and 20th September 2008 requesting for invoices and manual delivery notes in order to resolve the discrepancies on what was demanded and what was owed. These issues were never resolved. The same issues were also raised with other distributors in letters dated 25th June 2008 and 23rd July 2008 addressed to EAPCC raising the issue of outstanding rebates for the months of April, May and June 2008. The issue of unprocessed commissions and rebates for September 2009 was also raised in an internal memo dated 25th November 2008 sent by EAPCC's Meru Depot staff to the EAPCC Ag. Credit Controller.

14. PW 1 further stated that on 6th October 2008, the Commercial Manager issued instructions that their 18 contracted trucks waiting outside the EAPCC factory should not load any cement from the factory. Following intervention, only 4 trucks were allowed to load. On 16th October 2008, it wrote to EAPCC demanding Kshs. 16,354,395.00 on account of delayed payments as per invoices and rebates. It requested EAPCC to recover cement payment reference to cheques no. 000474 and 000476 amounting to Kshs. 15,800,000.00 from their invoices totalling to Kshs. 16,354,395.00. It also demanded payment from EAPCC through invoice no. 1088 for Kshs. 472,298.60 on account of transportation services. The letter and invoice were never acknowledged and the amount has never been paid. On 20th October 2008, Meru Mwangaza wrote to Equity Bank's Meru branch Manager informing him that recoveries of their cheques no. 000474 and 000476 were made from their invoices quoted in the letter to EAPCC.

15. On 17th October 2008, Meru Mwangaza received a letter from EAPCC demanding that it replace some allegedly lost cheques amounting to Kshs. 20,822,670.00. The Defendant responded by the letter dated 21st October 2008 denying that it was not aware of the lost cheques and in any case, the cement it was collecting was of the Kshs. 30,000,000.00 Bank Guarantee issued by Equity Bank.

16. On 27th October 2008, Meru Mwangaza wrote to EAPCC seeking an explanation why its vehicles had not been allowed to transport cement from 10th October 2008. EAPCC did not respond to the letter. In another letter dated 29th October 2008, the Defendant complained that EAPCC had appointed new distributors in breach of the contract with them. On 30th October 2008, it Advocates, *Mithiga & Co. Advocates*, wrote to EAPCC raising the fact that the initial account No. M6501 was suspended but Meru Mwangaza was still receiving statements from EAPCC in relation to the suspended account No. M650 with the last statement dated 21st October 2008 being sent to them on 28th October 2008 showing that the account had escalated to a balance of Kshs. 29,873,243.48 with no account as to how this amount was arrived at. EAPCC did not respond to these letters.

17. As regards the suspended account No. M6501, PW 1 stated that by a letter dated 31st August 2007 EAPCC demanded payment of Kshs. 23,173,917.00 for alleged unpaid cement deliveries. Meru Mwangaza responded by the letter dated 1st September 2007 and stated that it was a stranger to the demand and requested full particulars of the claim. Once that demand was disputed, the Managing Director of EAPCC referred to the Director of the Criminal Investigations Department (CID) by a letter dated 15th September 2007. The EAPCC Chief Security Officer also made a complaint on 11th April 2008. Upon conclusion of the investigations, Meru Mwangaza was exonerated and it was revealed that two EAPCC clerks at Nanyuki Depot were responsible for the total loss of the Kshs. 23,173,917.00. They were arraigned in court on 10th April 2008 and charged with theft by servant in the Chief Magistrate's Court in Nairobi. Meru Mwangaza stated that the demand for Kshs. 23,173,917.00 in respect of the suspended account No. M65001 was based on fraudulent activities by EAPCC employees and was therefore not valid.

18. Meru Mwangaza complained that the letter issued by EAPCC dated 21st November 2008 to Equity

Bank recalling the Kshs. 2,386,200.00 Performance Bond was without justification. It responded by the letter dated 24th November 2008 invoking Article 19 of the Agreement and lodging a formal complaint with the EAPCC Commercial Manager making reference to the letter dated 27th October 2008 complaining about its vehicles not being allowed to load and transport cement from EAPCC's factory since 14th October 2008. It also complained that as a result of the breach of contract, it had suffered losses amounting to over Kshs. 14,000,000.00.

19. PW 1 explained that Meru Mwangaza suffered colossal losses as it had invested heavily in transportation of cement on behalf of EAPCC and had taken loans from banks to enable it finance purchase of the lorries and trucks. She further stated as a result of EAPCC conduct, our Meru Mwangaza collapsed leading to financial strain on her family and the other directors and employees of the company.

Determination

20. Since I dismissed EAPCC's claim and it did not call any witnesses, its evidence was inadmissible. There was no evidence to support its defence to both claims. This of course, does not discharge Meru Mwangaza from proving its claims (see **Charterhouse Bank Ltd (Under Statutory Management) v Frank N. Kamau NRB CA Civil Appeal No. 87 of 2014 [2016] eKLR**).

21. Under **section 107** of the *Evidence Act (Chapter 80 of the Laws of Kenya)*, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. **Sections 108** and **109** of the *Act* further provide that the evidential burden is cast upon any party with the burden of proving a particular fact which he desires the court to believe in its existence. It is also well established that the standard of proof in civil claims is on the balance of *probabilities*. This means that the Court will assess all the evidence advanced and decide which case is more probable (see **Palace Investments Ltd v Geoffrey Kariuki Mwenda and Another NRB CA Civil Appeal No. 127 of 2007 [2007] eKLR**). The burden of proof is not lessened or diminished merely because the evidence is unchallenged or uncontroverted, the party still has to prove its claim.

22. The claim against EAPCC is in the nature of a claim for special damages. It is trite law that special damages must be **pleaded and proved** (see **Maritim and Another v Anjere [1990 – 1994] EA 312 and Nkuene Dairy Farmers Cooperative Society Ltd & Another v Ngacha Ndeiya NYR CA Civil Appeal No. 154 of 2005 [2010] eKLR**). In **Banque Indosuez v DJ Lowe and Company Ltd [2006] 2KLR 208** the Court of Appeal held that;

It was trite that special damages must not only be claimed specially but proved strictly for they are not the direct natural or probable consequences of the act complained of and may not be inferred from the act. The degree of certainty and probability of proof required depends on the circumstances and the nature of the acts themselves.

23. In this regard, I would adopt the dictum of Goddard LCJ., in **Bonhan Carter v Hyde Park Hotel Limited [1948] 64 TLR 177**, stated:

It is trite law that the Plaintiff must understand that if they bring actions for damages it is for them to prove damage. It is not enough to note down the particulars and to speak, throw them at the head of the court saying 'this is what I have lost', I ask you to give me these damages; they have to prove it.

24. It is against aforesaid principles and PW 1's testimony and documents that I now proceed to determine the following issues flowing from the Defendant's claims against the Plaintiff:

a. Whether EAPCC wrongfully called up the Performance Bond issued by Equity Bank.

b. Whether Meru Mwangaza is entitled to loss of profits amounting to kshs. 34,434,442.00 as a result of the breach.

c. Whether the 54,924,173.00 claimed made up as follows:

- i. Commissions under the Agreement from October 2008 to March 2009, at Kshs. 10/- per 50kg bag amounting to Kshs. 2,900,000.00
- ii. Rebate from Kshs. 8,327,148.00 from April to October 2008.
- iii. Refund of excess recovery from invoices from January to October 2008 amounting to Kshs. 554,395.00.
- iv. Amount under the Agreement from January to October 2008 amounting to Kshs. 1,142,630.00.

25. From the issues I have set out, the foundation of Meru Mwangaza's case is that it was owed money by EAPCC on account of transportation services and sale of cement under the Agreement. Unless EAPCC admitted the claim, Meru Mwangaza was bound to prove each claim. Once it proved that it was owed money, then it would naturally follow that EAPCC could not recall the Guarantee or Performance Bonds. Further, the commissions, rebates or any other payment must be located in the Agreement or any understanding of the parties.

26. From PW 1's evidence I have outlined, it is clear that the parties' relationship was fraught with disputes over payments as shown in the correspondence between EAPCC and Meru Mwangaza. In the letter dated 15th December 2008, Meru Mwangaza outlined its claims against EAPCC. It complained of delayed settlement of invoices and rebates and the suspension of its transportation services. It stated, "*Our invoices and rebates have been ignored and remain unpaid for three months thus affecting our cashflow*". It further complained about account M6501 have been "*inflicted with more than six million.*" It denied that it had issued the lost cheques amounting to Kshs. 20,822,670.00. It also complained that EAPCC did not give it notice before recalling the guarantees. PW 1 produced an internal memorandum dated 25th November 2008, showing that EAPCC was aware that commissions and rebates for September 2008 had not been paid.

27. Having reviewed the correspondence on the accounts between the parties, the emerging picture is clear, EAPCC made certain demands and in response, Meru Mwangaza requested for particulars of the demand. EAPCC did not respond to those demands and reconciliation of accounts did not take place. The court is now asked to step in to determine the question, how much does EAPCC owe Meru Mwangaza on all the heads of the claim made in this court?

28. As regards, the Commission payable, nothing would have been easier than to produce, for example, a record of the cement collected and sale over the period. As I understand, Meru Mwangaza would collect cement from the EAPCC factory. As this stage the vehicle would be issued with a Depot Dispatch Note showing how much cement was collected. The cement would then be either delivered at the EAPCC Depot or to customers. If a sale took place, then a customer would be issued with receipts. In order to claim its Commissions and Rebates, Meru Mwangaza would issue invoices. At the end of the day all the transaction would easily be documented, cross-checked and verified. The documentary evidence Meru Mwangaza has presented consists primarily of correspondence making demands over the period. This, in my view, is insufficient to establish the amount of commissions and rebates claimed by it. I also did not find the basis for the claim for rebates and how the amount of rebate was arrived at in order to be satisfied on the balance of probabilities not only were the rebates and commissions due under the Agreement but also that Meru Mwangaza was entitled to them for the period claimed in the counterclaim.

29. In its submissions, counsel for Meru Mwangaza referred to the letter dated 18th February 2018 to support the claim for refund of excess recovery from invoices from January to October 2008 amounting to Kshs. 554,395.00. That letter is essentially a demand letter. The facts upon which the claim is founded were not established nor the primary evidence to support the deduction and excess recovery produced. It cannot be sustained.

30. The other claim pleaded is the, “*Amount under the Agreement from January to October 2008 amounting to Kshs. 1,142,630.00*”. From the submissions, this amount is on account of transportation of cement services offered. While it is true that the amount was demanded, the basis of the demand, the supporting documents whether loading documents, delivery notes etc were not produced to establish the particulars of this item. It was therefore not proved.

31. Having reached the conclusion that the Defendant has not proved any of the heads of claim under the Agreement, I now turn to deal with the claims based on the Guarantees. These instruments provide security for payment in the event of default by Meru Mwangaza which had a 30-day credit window in which to make payment. Meru Mwangaza’s case was that it did not owe EAPCC any money and that in fact, it is EAPCC that owed it money. Had Meru Mwangaza established that EAPCC owed it money, the logical consequence of that finding would be that EAPCC could not recall the Guarantees.

Conclusions and Disposition

32. The Defendant case against the Plaintiff was an action based on goods and services delivered. The Defendant’s evidence was of a general nature, it established that there was contractual relationship between the Plaintiff and the Defendant and that the issue of accounts was in dispute. The Defendant was required to go further to establish the amount of cement it collected from the Plaintiff, transported and delivered and sold in order to establish that it was entitled to so much of the Commission, Rebate or other entitlement under the Agreement for the applicable period. It failed to do so on the evidence available. I therefore dismiss the Defendants case.

33. The final orders in this matter are therefore that the Plaintiff’s and Defendant’s cases are hereby dismissed. Each party shall bear its own costs.

DATED and **DELIVERED** at **NAIROBI** this 31st day of **AUGUST** 2020.

D. S. MAJANJA

JUDGE

Mr Masika instructed by Ochieng, Onyango, Kibet and Ohaga Advocates for the plaintiff.

Mr Munene instructed by Okubasu and Munene Advocates for the defendant.