



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & TAX DIVISION

HCCC NO. 12 OF 2019

GULF ENERGY LIMITED.....PLAINTIFF

VERSUS

EAST AFRICAN SAFARI AIR EXPRESS LIMITED.....DEFENDANT

RULING

1. This Court is asked to determine the Notice of Motion dated 10th March 2020 which seeks the following orders:-

- 1. The Plaintiff's case be reopened and the Plaintiff be allowed to recall its witness and to adduce additional evidence in the matter.*
- 2. The Plaintiff be granted leave to file a supplementary list and bundle of documents and the supplementary list and bundle of documents dated 9th March 2020 be deemed to be properly filed.*
- 3. Owing to their volume, the documents as outlined in the supplementary list referred to above be submitted to the court and the Defendant in soft by a flash disk.*
- 4. The Defendant be at liberty to cross-examine the Plaintiff's witness on the additional evidence adduced.*
- 5. The cost of this application be in the cause.*

2. The Plaintiff claims the sum of USD 844,458.74 from the Defendant on account of Jet A 1 Fuel allegedly supplied to the Defendant. In the Plaintiff's Complaint of 10th January 2019, the Plaintiff places aviation delivery receipts (ADRs) at the center of the claim. It is the Plaintiff's case that it would issue the ADRs to the Defendant immediately after fuelling and they would be signed by both the Plaintiff and the Defendant and were an acknowledgment that the aircrafts had been fuelled. Thereafter the Plaintiff issued corresponding invoices to the Defendant.

3. In respect to the ADRs, the Defendant denies that the Plaintiff issued ADRs or corresponding invoices to it and puts the Plaintiff to strict proof thereof. Then in Paragraph 8 of the Statement of Defence, it avers:-

“8. Without Prejudice to the above, the Defendant further avers that between the March 2018 and 31st July 2018, the Plaintiff fraudulently invoiced the company for fuel that it did not deliver and further attempted to cash cheques it had fraudulently obtained amounting to over USD 705,242.

PARTICULARS OF FRAUD

- i. The Plaintiff or its agents improperly placed orders with the Plaintiff in the name of the Defendant and in collusion with others;
- ii. The Plaintiff or its agents improperly issued ADRs in the name of its other customers and issued corresponding invoices to the Defendant;
- iii. The Plaintiff or its agents issued ADRs with altered meter reading for alleged fuel uplifted to the Defendant's aircraft;
- iv. The Plaintiff or its agents achieved deliveries of fuel for nefarious gains and issued ADRs and invoices to the Defendant where no

such fuel was uplifted to the Defendant's aircrafts;

v. That the Plaintiff continuously issued invoices without corresponding ADRs;

vi. The Plaintiff or its agents and in collusion with others fraudulently acquired cheques worth USD 705,242 and purported to bank the said cheques on 31.07.18."

4. This application comes after the Plaintiff had closed its case, two witnesses having testified.

5. In it the Plaintiff takes the position that from the Defence, the witness statement of one Donald E. Smith, the Defendant's Chief Executive Officer and the issues framed by the parties, there was no dispute as to the delivery of fuel to the Defendant. The Plaintiff contends that at the hearing its case proceeded on the premise that delivery of fuel and receipt of ADRs was not disputed. It states that, for that reason, the documents produced in evidence by way of ADRs were samples intended to prove the course of conduct of business between the parties.

6. The Defendant opposes the application and contends that the time and opportunity for the filing of documents has long passed and points to Rule 14(2) of the Practice Directions relating to case management in the Commercial and Admiralty Division of the High Court of Nairobi.

7. The Defendant thinks that the Plaintiff seeks to introduce additional evidence. Further, that the evidence sought to be adduced is likely to lengthen the trial as the Defendant will be required to understand and have an independent examiner inspecting some 1607 documents, file an Amended Defence and/or file a Counter-claim.

8. The Defendant argues that to allow the application will prejudice the Defence since the Statement of Defence was based on the documents supplied in the Plaintiff. That, in addition, it has all along relied on the documents filed by the Plaintiff as indicated in the response to request for particulars filed on 17th September 2019. It states that it clearly pointed out the disputed ADRs that had altered meter readings from the Plaintiff's bundle of documents.

9. In respect to Paragraph 8 of the Statement of Defence, the Defendant asserts that it was merely objecting to the description of the manner in which the Plaintiff alleges on the issuance of ADRs in Paragraph 8 of the Plaintiff. That the alleged inconsistency was further a description of the nature of the conduct between the two parties before the dispute arose.

10. Turning to the written statement of Smith, the Defendant states that it was purely a way of giving a historical background to the facts in issue and the averments raised in the absence of the ADRs are still true and hold as indicated in its response to the request for particulars filed before the Honourable Court. The Defendant holds the position that the alleged inconsistencies can be dispensed with during cross-examination.

11. The application before Court is for re-opening of a party's case and adducing of additional or further evidence. Both sides agree and I accept, that whether or not to allow a party to re-open its case and to adduce additional evidence is a matter of discretion. Further, that the manner of exercising that discretion is set out by Odeny J in David Kipkosgei Kimeli –vs- Titus Barmasai [2017] eKLR:-

"Kasango J. in the case of Samuel Kiti Lewa v Housing Finance Co. Of Kenya Ltd & another [2015] eKLR referred to a Ugandan High Court, Commercial Division case of SIMBA TELECOM –V- KARUHANGA & ANOR (2014) UGHC 98 which dealt with an application to re-open a case for purposes of submitting fresh evidence, the court referred to an Australian case SMITH –VERSUS- NEW SOUTH WALES [1992] HCA 36; (1992) 176 CLR 256 where it was held that:

"If an application is made to reopen on the basis that new or additional evidence is available, it will be relevant, at that stage, to enquire why the evidence was not called at the hearing. If there was a deliberate decision not recorded, ordinarily that will tell decisively against the application. But assuming that that hurdle is passed, different considerations may apply depending upon whether the case is simply one in which the hearing is complete, or one which reasons for the judgment have been delivered. In the latter situations, the appeal rules relating to fresh evidence may provide a useful guide as to the manner in which the discretion to reopen should be exercised."

It should be noted that the question of whether additional evidence should be taken at the trial is considered separately from the question of whether the case should be reopened as was held in the abovementioned Ugandan case. It further held that even after the case has been reopened, the court retains its discretionary powers whether to admit any piece of evidence or not. I also subscribe to the above that ultimately if the court allows reopening of a case, it still has the discretion to admit the evidence adduced or introduced. The court can still reopen the case and disregard the evidence from the witnesses. What purpose would that kind of move serve as it would be an exercise in futility. That is why the court is under a duty to exercise its discretion judiciously. The court should pose the question, Is the reopening of the case likely to embarrass or prejudice the opposing party? Is it going to cause injustice? If the answer is in the affirmative then the discretion should not be exercised in the applicant's favour."

12. As I understand it, the Plaintiff's request is premised on the reason that the Defendant has departed from the Defence it presented and that the additional evidence is necessary to confront a new line of defence that manifested and revealed itself in the cross-examination of its witness, one David Gathage. The argument by the Plaintiff is that it prosecuted its case on the basis that the delivery of fuel and issuance of ADRs was not disputed. It submits that the Defendant has changed the character of its Defence and has denied having received any deliveries from the Plaintiff and has further taken issue with the absence of all ADRs for January 2017 to July 2018 from its bundle of documents.

13. Whilst both sides have made lengthy submissions, the Court thinks that the success or failure of the application must turn on a narrow

issue. Given the substratum of the application, then if it is true that the Defendant has changed the nature of its defence then discretion must be exercised in favour of the Plaintiff. The converse also holds.

14. So what is the Plaintiff's case in regard to the ADRs and what Defence, if any, has the Defendant constructed in that respect. In looking at the nature of the Plaintiff's case, and Defence set up, the Court will not only give regard to the pleadings but also certain pre-trial matters and the issues framed that agreed by the parties as requiring determination. The reason for this expansive examination becomes apparent shortly.

15. The starting point are the pleadings. The Plaintiff's claim is for debt on account of fuel supplied to the Defendant but not paid for. The Plaintiff sets out the key terms of the business arrangement. This is in Paragraph 4 of the Plaintiff.

4. The key of the business arrangement between the parties were:

- i. The Plaintiff would fuel the Defendant's aircraft upon the latter's request. The fuelling took place at either the Wilson and Jomo Kenyatta International Airports depending on where the aircraft to be fueled was parked;
- ii. The quantity of fuel for each aircraft would be determined by the pilots flying the aircrafts;
- iii. The Plaintiff would issue aviation delivery receipts ("the ADRs") to the Defendant immediately after fuelling;
- iv. The ADRs would be signed by both the Plaintiff and the Defendant and were an acknowledgement that the aircrafts had been fuelled."

16. Not without importance is that the signed ADRs were an acknowledgement that the aircrafts had been fuelled. Thereafter the Plaintiff issued invoices that would correspond with the ADRs to the Defendant.

17. In the Statement of Defence, the Defendant denies the contents of Paragraph 4(i) – (iv) of the Plaintiff. Further, that the Plaintiff issued it with ADRs or corresponding invoices and puts the Plaintiff to strict proof thereof.

18. It then takes up the now much discussed Paragraph 8 of the Defence.

19. In the chronology of events, the Plaintiff took out a request for particulars on 26th March 2019 but this was not responded to until 17th September 2019. In the meantime, by a statement dated 1st August 2019 and filed on 7th August 2019, parties agreed the issues for determination to be:-

1. *Was there an Agreement for the Plaintiff to supply Jet A 1 Fuel to the Defendant?*
2. *If, yes what was the procedure for supplying the same and the terms for the supply of the fuel?*
3. *Did the Defendant pay for all the fuel received by it from the Plaintiff?*
4. *Whether the Plaintiff fraudulently invoiced the Defendant the sum of USD 844,458.74.*
5. *Whether the Defendant owed the Plaintiff the sums claimed or any amounts at all.*
6. *Costs.*

20. Counsel for the Plaintiff argues that by agreeing to issue number 3 which reads; "*Did the Defendant pay for all the fuel received by it from the Plaintiff?*" no issue as to whether or not the Plaintiff had delivered fuel to the Defendant arose. That the Defendant acknowledged that fuel had been delivered. Is this really an accurate characterization of what the issue spoke to?

21. In Paragraph 8 of the Statement of Defence, the Defendant was as unequivocal as can be. That between March 2018 and 31st July 2018, the Plaintiff fraudulently invoiced it for fuel that it did not deliver. I would then think that the issue framed as "*Did the Defendant pay for all the fuel received by it from the Plaintiff?*" required the Plaintiff to prove two things. One, the quantity of fuel delivered to the Defendant and second, whether all fuel delivered was paid for by the Defendant. It would have to be the Plaintiff to decide whether making out that case required the production of all ADRs.

22. And this Court is unable to accept that paragraphs 9 and 10 of the witness statement of Donald E. Smith for the Defendant, excused the Plaintiff from proving delivery of fuel. That statement needs to be read in its entirety and, further, paragraphs 16 and 17 would be telling as to whether or not the Defendant took up issue with the fuel said to have been received by it.

23. Paragraph 16 and 17 reads:-

"16. That the Plaintiff has continuously issued altered Aviation Delivery Receipts (ADRs) invoices without corresponding invoices and inconsistent figures for the amounts allegedly owed by the Defendant.

17. That the Plaintiff has also not provided the necessary Fuel Delivery Request forms with the corresponding ADRs and invoices which is further proof of their intention to defraud the Defendant to wit:-

- a) The Plaintiff or its agents improperly placed orders with the Plaintiff in the name of the Defendant and in collusion with others;
- b) The Plaintiff or its agents improperly issued ADRs in the name of its other customers and issued corresponding invoices to the Defendants;
- c) The Plaintiff or its agents issued ADRs with altered meter readings for alleged fuel uplifted to the Defendant's aircraft;
- d) The Plaintiff or its agents achieved deliveries of fuel for nefarious gains and issued ADRs and invoices to the Defendant where no such fuel was uplifted to the Defendant's aircrafts;
- e) That the Plaintiff continuously issued invoices without corresponding ADRs;
- f) The Plaintiff or its agents fraudulently acquired cheques worth USD 705,242 and purported to bank all the said cheques on 31.07.18."

24. Let me then turn to the request for particulars. The Plaintiff asks this Court to give regard to Paragraph 2 and 3 of the request which reads:-

"2. Of Paragraph 8 of the Defence, of the allegation that the Plaintiff fraudulently invoiced the Defendant for fuel it did not deliver and further that it attempted to cash cheques it had fraudulently obtained:-

- a) Identify the invoices alleged to have been fraudulently issued, by invoice number and date;
- b) Specify the date when the said invoice were issued and to whom and when they;
- c) Identify the cheques that are alleged to have been fraudulently obtained; when and from whom.

3. Of the particulars of fraud;

- a) Identify the agents alleged to have placed the orders;
- b) Identify the parties with whom the Plaintiff is alleged to have colluded with;
- c) Identify the customer who were allegedly issued with ADRs that were invoiced to the Defendant;
- d) In respect of c above, identify ADRs by number and date and the invoices it is claimed they correspond to;
- e) Identify by number and date the invoices allegedly issued without corresponding ADRs."

25. The Defendant makes the following answer:-

2. Of Paragraph 2 of the Request for Particulars;

- a) On request (a) and (b), the Defendant refers the Plaintiff to the Defendant's list of documents at Page 10.
- b) On request (c), the Defendant refers the Plaintiff to its list of documents from pages 11- 75.

3. Of Paragraph 3 of the Request for Particulars;

- a) The Defendant relies on their reply to the demand of letter at Page 255 of the Plaintiff's bundle alluding to the knowledge of collusion between staff and/or agents by both the Plaintiff and the Defendant.
- b) The Defendant further notes in Paragraph 17 of their witness statement they are yet to be in receipt of some of the ADRs.
- c) The Defendant also is guided by the Plaintiff's bundle of documents page 9, 12, 30 and 42.
- d) As clause b above.
- e) As clause b above."

26. Regarding ADRs the question was for the Defendant to identify the ADRs issued to third parties but which were invoiced to the

Defendant and secondly, the invoices allegedly issued without corresponding ADRs. The answer given by the Defendant was that they are yet to be in receipt of some of the ADRs. This was in addition to the answer given in regard to the identity of the customers who were allegedly issued with ADRs that were invoiced to the Defendant to which the Defendant also made reference to 4 specific ADRs.

27. The Plaintiff takes it that the Defendant's contention was only in respect to the 4 ADRs. But that in my view would be to ignore the Defendant's case that in respect to invoices issued without corresponding ADRs, the Defendant clearly asserted that it was not in receipt of some ADRs. This in my view was notice to the Plaintiff that it would be required to produce ADRs for each notice issued. In this regard I accept the submissions of the Defendant counsel that the 4 ADRs were not an exhaustive and comprehensive list.

28. The Plaintiff further argues that there was a change of position in the Defendant's notice to produce. The Defendant notice to produce came after the following order by Majanja J :-

1. The Plaintiff shall facilitate inspection of all the original documents, it intends to rely on by the Defendant within 21 days.
2. The Defendant shall set out a file a schedule of the documents it objects to and the reasons within 7 days of the inspection.
3. Thereafter each party shall file an affidavit indicating that they have furnished all documents within their power and possession.
4. The same orders (1) and (2) shall apply to the Defendant.
5. Mention on 07/11/2019 for further orders/directions.

29. It is the Plaintiff's argument that at the end of it all, the Defendant list of objected documents increased from 4 to 47 and that the reasons given for objection were not raised in the Defence. Examples are that invoices number 1, 14 and 15 were not ETR complaint.

30. That may be so but my understanding is that the inspection exercise was in respect to documents that were in the bundle of documents that the Plaintiff had filed. The exercise did not lessen the Plaintiff's burden of placing before Court all documents that would assist it prove its case and to surmount the Defence that had been set up.

31. What emerges is that right from the Defence pleaded, the amount of fuel delivered was a contentious issue as part of the Defence was that the *"Plaintiff fraudulently invoiced the company for fuel that it did not deliver."* This issue was not taken away by words the framing of agreed issue 3 to wit *"Did the Defendant pay for all the fuel received by it from the Plaintiff?"* As to whether or not the Plaintiff was expected to produce all ADRs, this Court has sought to demonstrate that not only from the statement of Defence but also from the answer to the request for particulars, the issue as to whether the ADRs before Court were all that had issued was not an unlikely matter.

32. Ultimately this Court is unable to find that by asking questions about the deliveries of fuel and missing ADRs, the Defendant had metamorphosed its Defence. That being the case, and the Plaintiff's plea for re-opening of the case and calling for further evidence being solely hinged on the proposition that the Defendant had shifted its Defence, then the Application of 10th March 2020 is for disallowing. That Motion is hereby dismissed with costs.

Dated, Signed and Delivered in Court at Nairobi this 3rd Day of August 2020

F. TUIYOTT

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 17th April 2020, this Ruling has been delivered to the parties through virtual platform.

F. TUIYOTT

JUDGE

PRESENT:

Ms Kirimi for Plaintiff.

Mr Irungu holding brief for Ms Ngunjiri for Defendant.