



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCC NO. 331 OF 2011

FINEJET LIMITED.....PLAINTIFF

-VERSUS-

FIVE FORTY AVIATION LIMITED.....DEFENDANT

JUDGMENT

1. Through an amended plaint dated 5th August 2011, the plaintiff herein FINEJECT LTD, sued the defendant, FIVE FORTY AVIATION LTD, seeking the following orders:

a) The sum of US\$ 656,304.49

b) Costs of this suit.

c) Interest on (a) and (b) above.

d) Such other or further relief as this Honourable court may deem just to grant.

2. The plaintiff's case is that the defendant owes it the sum of USD 656,304.49 on account of petroleum products sold and delivered by it to the defendant, on diverse dates and various points of supply in Kenya, Entebbe and Juba. The plaintiff states that the defendant made attempts to pay the debt by issuing 3 cheques in the total sum of USD 90,000 which cheques were dishonoured and returned to the plaintiff unpaid.

3. The defendant filed its statement of defence dated 5th September 2011 wherein it admits that the plaintiff supplied it with fuel from time to time but denied that it owes the plaintiff the sum of USD 656,304.49 as alleged.

4. The defendant states that under fuel supply contract with the plaintiff, it was agreed that the price of fuel would be based on flats prices with a small differential to be agreed upon before issuance of invoice but that after some time, the defendant realized that invoices were being generated by the plaintiff in breach of the pricing mode and that the plaintiff had departed from the Flat based prices and was instead invoicing on prices that it had arbitrarily decided upon without consultation as had been agreed.

5. It is the defendant's case that the prices claimed by the plaintiff were never agreed upon and are therefore not payable and amounts to an overcharge.

6. The defendant maintains that going by their contract, its account with the plaintiff is in credit and that it is the plaintiff who owes it supply of fuel that has been paid for, in advance. It states that the cheques issued to the plaintiff were stopped when it was discovered that the defendant did not owe the plaintiff any money.

7. At the hearing of the case, the plaintiff presented the testimony of its Managing Director **Mr. John Kinyi Kimani** (PW1) who relied on his witness statement and the plaintiffs bundle of documents dated 4th December 2015.

8. On cross examination PW1 testified that the plaintiff delivered fuel to the defendant through various suppliers against an aviation delivery receipt. He states that the company supplying fuel would issue delivery notes that would be signed by the pilot of the aircraft. He presented copies of invoices and account balances.

9. He stated that he never made promises the defendant on any prices but that the plaintiff would call for the best prices and advise its clients

on a monthly basis. He added that the defendant's claim for an overcharge is an afterthought. He stated that they did not have any contract based on plat but that they used to offer their fuel prices at the beginning of every month.

10. He reiterated that the defendant did not dispute their accounts until the matter went to court and that the defendant did not make any claim for an overcharge.

11. The defendant presented the evidence of its Chief Executive Officer **Mr. Donald Earle Smith** (DW1) who adopted his witness statement dated 5th September 2011. He confirmed that the plaintiff and defendant agreed on the fuel supply subject to the same price structure and credit terms that the defendant had with Chevron. He stated that any supply of fuel needed to indicate fuel receipt number duly signed by defendant official, aircraft number and the LPO making the request.

12. On cross examination, he stated that the defendant raised a complaint over the overcharge. He confirmed that the plaintiff issued them with fuel prices every month and that the defendant would make weekly payments without any invoice.

13. He confirmed that cheques of USD 90,000 issued to the plaintiff by the defendant were stopped and have not been paid as the amount was not owed. He also confirmed that the reason for stopping the cheques was not disclosed.

14. Parties canvassed/summarized their respective cases by way of written submissions which I have considered.

Analysis and determination.

15. Having considered the pleadings filed herein, the witness testimonies and the written submissions, I find that the main issue for determination is whether the plaintiff established that the defendant owes it the amount of USD 656,304.49 for the fuel that it allegedly supplied to the defendant. It was not disputed that the plaintiff and the defendant had an agreement, albeit not documented, in which the plaintiff would supply the defendant with fuel at different times and places.

16. DW1 confirmed the existence of the agreement to supply fuel as follows:

“The fuel was supplied to us from December 2008 until 2011.....We did not agree on any amount and paid on account. On plats, there was a contract to supply at plat. December, there was no written agreement. There was verbal agreement in the first 5 months.”

17. The defendant also stated as follows at paragraph 4 of the defence: -

“In further answer to paragraph 3 of the plaint, the defendant states that it entered into a contract with the plaintiff to supply it with fuel and that the said contract was contained in various correspondence with the plaintiff in which it was agreed that the price of fuel would be based on plats prices with a small differential which was always agreed on consultation before issuance of any invoice.”

18. The general rule is that a claim for a liquidated sum must not only be specifically pleaded but must also be proved.

19. In the present case, the plaintiff presented copies of dishonoured cheques and invoices in support of its claim. This court will now scrutinize each of the invoices produced by the plaintiff in determining if they meet the threshold of proof expected in this case.

Dishonoured Cheques.

20. It was not disputed that on diverse dates in 2016 the defendant issued the plaintiff with cheques Nos. 4287, 4288 and 4289 to the tune of a total of USD 90,000. It was also not disputed that the said cheques were dishonoured and returned to the plaintiff unpaid.

21. DW1 testified as follows on the issue of the dishonoured cheques: -

“I issued cheques to the plaintiff. We stopped the cheques 90,000 USD. We have not paid as it was not owed.... I have not indicated the reason for stopping the cheques.”

22. In its statement of defence, the defendant stated that the cheques were stopped when the defendant realized that the plaintiff owed it money. The defendant did not however place any material before the court to show that the plaintiff owed it any money or lodge a counterclaim to that effect.

23. My finding therefore is that the plaintiff established that the defendant owes it USD 90,000 on account of the dishonoured cheques.

Unpaid Invoices.

24. As I have already stated in this judgment, the plaintiff claims US\$ 656,304 for the price of petroleum products (jet fuel uplifts) sold and delivered to the defendant. It is not in dispute that the products were delivered to the defendant. What is in dispute however is the mode of payment and by extension, the amount due to the plaintiff. On one hand the defendant avers that the price of the fuel would be based on plats prices with small differential that was agreed on consultation before the issuance of invoice. The plaintiff on the other hand states that it

would inform the defendant of the prevailing market prices at the commencement of every month.

25. During the hearing, the plaintiff PW1 produced the bundle of documents dated 4th December 2015 as evidence and with regard to invoices and he testified that the invoices and customer reconciliations were found on pages 27 to 419. The invoices appear as follows;

DATE	INVOICE NUMBER	AMOUNT
4 TH JULY 2011	D300254	507,833.53
21 ST MAY 2011	JUB/011/11	1890.00
24 TH JUNE 2011	JUB/026/11	3171.40
TOTAL		512,894.93

26. I note that the invoices correspond with the running account of the plaintiff and the same were duly received and stamped by the defendant. Based on the invoices, the question which arises is whether the plaintiff has proved its case for the amount of USD 656,304.49. The plaintiff was required to prove his claim against the defendant on the balance of probabilities. In the case of ***Kirugi & Anor. v Kabiya & 3 Others [1987] KLR 347*** the Court of Appeal stated that the burden was always on the plaintiff to prove his case on the balance of probabilities, and that such burden was not lessened even if the case was heard by way of formal proof.

27. The **Halsbury's Laws of England, 4th Edition, Volume 17, at paras 13 and 14:** describes it thus:

“The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose.

28. It is trite law that he who alleges must prove. Sections 107,108 and 109 of the Evidence Act Cap 80 Laws of Kenya are clear that:

107(1) whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those acts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108 The burden of proof in a suit or proceeding lies in that person who would fail if no evidence at all were given on either side.

109 the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

29. In view of the foregoing, the legal burden is discharged by way of evidence. The defendant did not rebut the contents of the invoices given. The business model agreed upon the parties was that of payment upon delivery. The plaintiff submitted that the defendant did not dispute that the fuel was delivered and that it acknowledged delivery. The defendant did not state that it settled the debt but it came out in evidence that it issued cheques that bounced. The defendant did not state that it contested the amount stated in the invoices.

30. **Section 3(1) of the Sale of Goods Act, Chapter 16 of the Laws of Kenya,** recognizes that:

“A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price.”

31. In conclusion, the plaintiff has proved on a balance of probabilities that he supplied goods to the defendant and transferred property in the goods. In the result, I find that the value price of the goods delivered by the plaintiff to the defendant in the contested months aggregate to USD 512,894.93 which amount includes the amount in the dishonoured cheques according to the invoices raised and received by the defendant. I also observe that the plaintiff has been deprived its use of the sum USD 512,894.93 which the defendant was required to pay and I therefore find no reason to deprive the plaintiff interest.

32. ***Jane Wanjiru Gitau v Kenya Power and Lighting Company Limited (2006) eKLR*** Hon. Mr. Justice J.B. Ojwang, as he then was, quoted with approval the decision of Law ***J.A. in Premlata v Peter Musa Mbiyu [1965] EA*** where he remarked: -

“In both these cases the successful party was deprived of the use of goods or money by reasons of a wrongful act on the part of the defendant, and in such a case it is clearly right that the party who has been deprived of the use of goods or money to which he is entitled should be compensated for such deprivation by the award of interest.”

24. For the above reasons, I enter judgment for the plaintiff for the sum of USD 512,894.93 together with interest at court rates from the date of filing this suit till payment in full. I also award the plaintiff the costs of this suit plus interest, at court rates, from the date of this judgment.

Dated, signed and delivered via Microsoft Teams at Nairobi this 17th day of December 2020 in view of the declaration of measures restricting court operations due to Covid -19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17th April 2020.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Muganda for the Plaintiff.

Mr. Mungu for the Defendant

Court Assistant: Sylvia