



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)

COMMERCIAL AND TAX DIVISION

CIVIL CASE NO.247 OF 2015

CONSOLIDATED WITH 191 OF 2015

VIVO ENERGY KENYA LIMITED.....PLAINTIFF

VERSUS

FIVE FORTY AVIATION LIMITED.....DEFENDANT

JUDGMENT

1. The Plaintiff Vivo Energy Kenya Limited through a plaint dated 14/5/2015 sued the defendant seeking judgment for US\$ 64,261 with costs of the suit. The defendant filed to the plaintiff's claim dated 22nd June 2015 praying the plaintiff suit be dismissed. The plaintiff filed a Reply to statement of defence dated 29th June 2015 praying for judgment against the defendant in terms of the prayers in the plaint.

2. The defendant herein had meanwhile filed a separate suit over the same subject matter through Hccc 191 of 2015 through a plaint dated 20th April 2015 seeking judgment against the plaintiff herein for USD 146,856.90 with costs and interest. The plaintiff filed defence to defendant's suit through a statement of defence dated 29th June 2015 praying that the defendant's claim be dismissed with cost.

3. On 6th February 2017 the two suits were consolidated and Hccc 247 of 2015 made the lead file.

4. Brief facts of the suit is that the parties herein had a business relationship to which the plaintiff would supply fuel to the defendant for its aircrafts at various airports within Kenya. The defendant was to provide a guarantee from a reputable bank to the plaintiff as well as proving security cash to the plaintiff. The plaintiff proceeded to make a cash deposit of USD 131,000 and a guarantee of USD 200,000 to the plaintiff issued by Chase Bank.

5. The plaintiff supplied the defendant with fuel until a dispute arose on the invoicing and claim for non-payment; the defendant claiming the plaintiff had erroneously invoiced the defendant for fuel not supplied at a USD 77,000 and charging wrong prices in respect of fuel in Mombasa by charging Malindi price amounting to USD 134,117.90. The plaintiff on the other hand claimed the defendant having been supplied with fuel by the plaintiff, the defendant failed to pay the same instead raising the issues regarding accounts and wrong pricing. This resulted in accounts being taken. None of the party admitted each other's claim resulting to present suits.

6. I have very carefully perused the pleadings herein, parties witness statements, parties oral evidence, counsel submissions and as the parties did not agree on the issues for determination, doing the best I can in the circumstances; I am of the view that the issues for determination herein can be summarized as follows:-

a) Whether the plaintiff has proved on balance of probability, that it is entitled to the claim of USD 64,261?

b) Whether the defendant has established its counterclaim of USD 146,856.90?

A) Whether the plaintiff has proved on balance of probability, that it is entitled to the claim of USD 64,261?

7. The plaintiff in support of its claim of USD 64,261 called **PW1**, Jacob Kithome Kakunu, the Vivo Energy Kenya Limited Aviation manager for Africa, who averred that he was aware of the plaintiff's claim of USD 64,261, in respect of fuel supplied to Five Forty Aviation Limited. He relied on his witness statement dated 14th May 2015, as his evidence in chief (**Exhibit P-1**) and further list of documents dated 19th March 2018 (**Exhibit P-2**).

8. The defendant called Alkarim Kassam, an Administrator manager with Five Forty Aviation Limited, in charge of daily running of

administration as well as Finance deposit and the procurement department; which he urged takes into consideration of receiving fuel. He testified that he had filed witness statement which he adopted as his evidence in chief (**Exhibit D (a)**) and statement of Ngunjiri which he adopted in support of the defendant's case as (**Exhibit D 1 (b)**) and all defendants list of documents as (**Exhibit D-2**).

9. The plaintiff herein claim USD 64,621 due and payable to it by the Defendant being fuel products supplied to the defendant's planes at different fueling points and for which the plaintiff raised invoices for payment by defendant but the defendant failed to pay for some fuel products supplied to the tune of USD 64,261 and upon several demands the defendant failed to pay raising several issues to justify non-payment, but the plaintiff avers that such issues have been adequately and sufficiently been addressed throughout reconciliation of accounts leading to the outstanding amount.

10. **PW1**, Jacob Kithome Kakunu, testified that both parties arising out of dispute of amount payable, had reconciliation done by parties and found the defendant owed USD 408,709.77. **PW1** testified that upon adequately settling the issues which the defendant was raising in refusing to pay the plaintiff's claim, several letters including letters dated 28/3/2014 (*see plaintiff's bundle P-2 page 11*) and letter dated 13/5/2014 in defendant's bundle and 20/8/2014 (**Exhibit P-2**), were issued and which letters were not responded to nor challenged during the hearing of the suit.

11. The defendant in its defence denies the plaintiff's claim, however, during the hearing the following came out from **DW1**; **DW1** stated that defendant do not owe the plaintiff USD 64,261 adding that the defendant was overcharged as per Malindi rates. During cross-examination of **DW1**, he admitted that there were discussions and meetings between the parties and reconciliation was carried out following which defendant paid USD 12,346.64 and urged the amount of USD 134,117/90 came out after realizing its staff were colluding with the plaintiff. **DW1** also admitted they received a letter dated 13/5/2014 from the plaintiff on page 16 (**Exhibit P-2**) informing them the plaintiff had given them a credit in their account. **DW1** specifically told this court as follows:-

"The claim of USD 64,261 is not in dispute."

DW1 admitted that the defendant after reconciliation of the accounts issued cheques when the court in issue was USD 408,709.77.

12. The cheques issued were to clear the outstanding balance but the defendant stopped the same alleging the accounts had been manipulated. In the instant suit, the defendant did not call any evidence to show the plaintiff colluded with the defendant's employee to fleece the defendant or defraud them or the accounts were manipulated. The standard of proof of an allegation of criminal nature such as the one alleged by the defendant is beyond reasonable doubt. No attempt has been made to prove any of the allegations made by the defendant. I find the defendant's allegation not any baseless but an afterthought. The defendant is estopped from denying the plaintiff's claim by virtue of its conduct, admission and issuance of full payment through cheques which it stopped for no apparent reason. Its intention was to deny the plaintiff its lawful dues; which this court finds must be settled.

13. In view of the above, I find the plaintiff has demonstrated and proved on balance of probability that it is entitled to the claim of USD 64,261 from the defendant.

A) Whether the defendant has established its counterclaim of USD 146,856.90?

14. The defendant avers that the plaintiff supplied the defendant with fuel until sometime in 2014 when the defendant discovered the plaintiff had erroneously invoiced the defendant for fuel not supplied and also wrongly charged the wrong prices in respect of fuel in Mombasa by charging Malindi prices, as a result of which the plaintiff owes the defendant the sum of USD 146,856.90.

15. The plaintiff denied the defendant's claim.

16. The defendant called **DW1**, Alkarim Kassama, who relied on his witness statement (**Exhibit-D 1 (a)**) and witness statement by Anthony Ngunjiri (**Exhibit D-1 (b)**). He testified that they were overcharges of the fuel rates for Mombasa Airport which had been charged as per Malindi rates at a tune of USD 134,117.90 (*see page 46 of the defendant's bundle of documents*) on what was charged and ought to have been charged; which show the difference between Malindi and Mombasa rates; **DW1** referred to a letter over the issue of overcharges and statements, claiming the defendant was charged for fuel supplied to Kenya Airways amounting to USD 132, 142, which he admitted the error was subsequently corrected and credit given to the defendant. **DW1** also stated the documents showed the credit for Kenya Airways was given but that no credit was given between Malindi and Mombasa rates. **DW1** concluded by stating that the amount of USD 134,117 is owing. He also raised the issue over USD 77000 in which he averred there is an opening account of USD 77000 but how it disappeared is unknown to the defendant.

17. **Section 107 of the Evidence Act** provides:-

"(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 facts 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. "

In this suit the burden of proof in respect of the defendant's claim relies with the defendant to prove its claim.

18. The plaintiff called **PW1**, Jacob Kithome Kakunu, who stated the amount of USD 77000 was in respect of an invoice belonging to Kenya Airways, which the plaintiff reversed being not a claim against the defendant. **DW1** admitted it was an erroneous entry that the plaintiff reversed through No.40127213 UI and credit note 4127316 UI issued in defendant's favour.

19. On overcharging of USD 134117.90 over fuel rates at Malindi and Mombasa, **DW1** stated the charge had been agreed and fuel was provided to the defendant on monthly basis.

20. The defendant did not produce any document stating the plaintiff had charged different prices than agreed between itself and the defendant nor did the defendant produce any documentary evidence or any evidence to prove the plaintiff were indeed more expensive than other companies. The plaintiff wrote letters to the Defendant on the issue of the fuel rates but the defendant did not respond nor challenge the plaintiff's letters especially the letter of 20/8/2014 and 13/5/2014. The plaintiff further referred to invoice dated 27/10/2013 and reversal for the sum of USD 77000 confirming the USD 77000 claim was accordingly reversed. This has not been challenged.

21. **PW1**, testified that both parties did reconciliation several times and confirmed the plaintiff's claim correct. **DW1** on being cross-examined confirmed reconciliation was carried out. He averred the claim of USD 134,117/90 came after the defendant realized, that their staffs were colluding with the plaintiff. This is a serious allegation which the defendant failed to prove as they did not call any staff to confirm the alleged collusion, no one was arrested and charged and even witness statement by Anthony Njure has no reference to that issue and no letter was forwarded to the plaintiff raising such an issue.

22. **DW1**, on being asked whether the USD 77000 were not credited to their account, he did not deny the crediting of their account with such an amount. **DW1** further confirmed that during the reconciliation of the accounts no overcharge was found. On being referred to a letter in defendant's Bundle of documents (**Exhibit D-2**) on no. 30 item No. 1 and 4 he admitted there was a credit of USD 77000. The defendant has not demonstrated that they objected to the contents of the letter and as such the defendant is estopped from denying that credit of USD 77000 was made in their favour by the plaintiff.

23. The defendant's claim is a special claim, which the defendant had a duty to strictly prove. The defendant was under duty to present evidence to prove it's claim. The defendant made allegations over it's claim but failed to call sufficient evidence to prove the same. **DW1** averred that they undertook their own investigation and found the amount due but did not produce their internal investigation report. No evidence on alleged collusion between the representatives of the plaintiff and the defendant as alleged by the defendant was produced. The defendant only made mere allegations but failed to call evidence to support the allegation of existence of collusion to overcharge the defendant. The defendant instead of proving it's allegations left the matter for speculation, which cannot be a basis for finding in favour of a party making an allegation without proving it. I find unsubstantiated allegations cannot be used to avoid obligation by any party.

24. **Section 120 of the Evidence Act** provides:-

"When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing."

25. In the instant suit, upon the parties having undergone through a reconciliation exercise and the defendant having admitted being indebted to the plaintiff and even proceeding to issue cheques to settle the amount found due, which cheques it stopped and upon failing to render evidence on alleged collusion and evidence in support of the claim of USD 134,117/90, I find the defendant is estopped from alleging the reconciliation was not true and correct. The defendant is in my view by its own conduct estopped from denying the truth of it's indebtedness to the plaintiff nor claim the amount which is based on speculation that it was overcharged due to collusion which it could not prove.

26. The upshot is that I enter judgment as follows:-

a) **Judgment for the plaintiff for USD 64,261.00 with interest from 14th May 2015 till payment in full.**

b) **Costs of the suit to the plaintiff.**

c) **The defendant suit (Hccc 191/2015/ (in Hccc No.247 of 2015) is dismissed with costs to the plaintiff.**

Dated, signed and delivered at Nairobi this 25th day of April, 2019.

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J .A. MAKAU

JUDGE