



REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

(CORAM: CHERERE-J)

CIVIL CASE NO. 10 OF 2017

BETWEEN

TATA AFRICA HOLDINGS (KENYA) LIMITEDPLAINTIFF

AND

CANELAND LIMITED.....1ST DEFENDANT

SURJIT SINGH PANDHAL & MALKIT SINGH.....2ND DEFENDANT

JUDGMENT

1. The Plaintiff's claim against the defendants jointly and severally is for Kshs. 40,397,984/- together with interest at 18% from the date of invoices in respect of goods supplied and/or services rendered to the 1st defendant at 2nd Defendants' request between the years 2013 to 2015.

2. The Defendants in their joint statement of defence filed on 30.05.17 denied the Plaintiff's claim in its entirety and challenged the Plaintiff's legal capacity to sue on behalf of its subsidiary companies contending that they are separate and distinct entities and not one.

Plaintiff's case

3. **PW1 DENNIS MUSUNGU OGOLLA**, head of Business in charge of John Deere Agricultural Equipment told court that the Plaintiff and its subsidiaries Tata Motors Limited and Integrated Construction Equipment (ICE) Limited are in the business of selling motor vehicles, agricultural tractors, heavy duty machinery and constructions equipment and that the 1st defendant was their dealer for purposes of selling goods on their behalf. He identified various vehicles and tractors valued at Kshs. 29,293,127/- and Kshs. 10,490,310.20 that were sold by the 1st Defendant and for which he said that only Kshs. 1,800,000/- was paid.

4. The witness identified the following invoices **PEXH. 1 (a) to (c)** respectively for the total sum of Kshs. 10,490,310.00 which remains unpaid in respect of vehicles. These are:

- i. Invoice number 7408 dated 30.06.15 for Kshs. 2,496,158.00
- ii. Invoice number 7382 dated 14.08.15 for Kshs. 3,897,646.00
- iii. Invoice number 7552 dated 30.07.15 for Kshs. 4,096,506.00

5. The witness further told court that the invoice number 4855 for Kshs. 4,745,297.00 **PEXH. 2** was partly paid and there remains a balance of Kshs. 37,312.00 on that invoice. The witness acknowledged that the sum of Kshs. 577,239.00 in respect of parts had been paid in full.

6. Concerning agricultural tractors, the witness identified copies of invoices and orders as **PEXH. 3 to 9** issued to the Plaintiff for the total sum of Kshs. 29,293,127.00 which the witness said remains unpaid.

7. In cross-examination by the defence counsel, the witness conceded that the business transaction in issue was between the Plaintiff and the 1st Defendant and not with its directors the 2nd Defendants herein. The witness also conceded that he did not have written authority from the Plaintiff's subsidiaries ICE Limited and Tata Motors Limited to bring this suit on their behalf.

8. Defendants did not tender any evidence. I have considered the evidence on record and submissions filed on behalf of the parties. The issues for determination include among them the Plaintiff's locus to institute this claim on behalf of its subsidiaries Tata Motors Limited and Integrated Construction Equipment (ICE) Limited.

9. With regard to Plaintiff's locus, the Defendants hold the view that the suit is fatally and fundamentally defective for the reason that the Plaintiff did not file a resolution by Tata Motors Limited and Integrated Construction Equipment (ICE) Limited authorising the filing of this suit. Reliance was placed on the Ugandan case of **Bugerere Coffee Growers Ltd v Seraduka & Anor. (1970) EA 147** where it had been held in dismissing the suit that:

“When companies authorize the commencement of legal proceedings, a resolution or resolutions have to be passed either at a company or Board of Directors’ meeting and recorded in the minutes, but no resolution had been passed authorising the proceedings in this case.”

10. The Plaintiff though not denying that it did not file any resolution authorising the Plaintiff to bring a claim on behalf of Tata Motors Limited and Integrated Construction Equipment (ICE) Limited contends that the LPOs issued by the defendants were to the Plaintiff which also issued invoices to the Defendants. The Plaintiff holds the view that the Defendants having received goods ought not to be allowed to avoid the contract.

11. There is no doubt that subsidiary companies which though in one sense are the creatures of their parent companies are nevertheless under the general law to be treated as separate legal entities with all the rights and liabilities which would normally attach to separate legal entities. They have a right to sue and be sued in their name. (See **Adams v Cape Industries PLC [1990] 1 Ch. 433**).

12. Evidently, there is no resolution by Tata Motors Limited and Integrated Construction Equipment (ICE) Limited authorising the Plaintiff to file this suit on their behalf. With due respect, the LPOs and invoices cannot be paralleled to a board resolution where therein lies the power to sanction the commencement of court actions in the name of a company. Consequently, I find that the claims on behalf of Tata Motors Limited and Integrated Construction Equipment (ICE) Limited particularized at paragraphs 6 and 7 of the plaint cannot be sustained by the Plaintiff.

13. Having said that, and the Plaintiff's witness having acknowledged that the sum of Kshs. 577,239.00 in respect of parts as particularized at paragraph 8 of the plaint has been paid in full, this court is left with the sole duty of establishing whether the claim under paragraph 5 of the plaint has been proved.

14. The Plaintiff's claim falls in the category of special damages that must not only be specifically pleaded but also proved with a degree of certainty and particularity. See **National Social Security Fund Board of Trustees vs Sifa International Limited (2016) eKLR** and **Macharia & Waiguru vs Muranga Municipal Council & Another (2014) eKLR**.

15. I have considered the exhibits *vis a vis* the particularized invoices at paragraph 5 of the plaint. Of all the invoices produced in respect thereof, only the sum of **Kshs. 1,824,680/-** vide invoice number PVINVS0108 dated 25.09.14 which was marked as **PEXH. 3 (b)** was specifically pleaded and proved.

16. Concerning Plaintiff's claim for interest at 18% from the date of the invoices, no evidence was led to justify the claim for such rate of interest and the same is declined.

17. In conclusion, the gist of the suit against the 2nd Defendants is premised upon them being directors of the 1st Defendant **CANELAND LIMITED**, an independent entity that can sue or be sued in its own name. This suit therefore discloses no cause of action against the 2nd Defendants.

18. For all the foregoing reasons, judgment is entered for the Plaintiff against the 1st defendant for **Kshs. 1,824,680/-** with interest at court rates from date of filing and costs with interest thereof from the date of this judgment. The claim against the 2nd Defendants is dismissed with costs with interest thereof from the date of this judgment.

DELIVERED AND SIGNED IN KISUMU THIS.23rd DAY OF..May..2019

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Felix

For Plaintiffs/Applicants - Mr Machage

For Defendants/Respondents - Mr Maganga