



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL CAUSE NO. 324 OF 2014

MUKOMA MWENZE BENJAMIN

T/A BEN LA CONCORDE.....PLAINTIFF

-VERSUS-

SCARDALE INVESTMENTS LIMITED.....1ST DEFENDANT

RUTH OTIENO.....2ND DEFENDANT

J U D G M E N T

1. The Plaintiff, **Mukoma Mwenze Benjamin** trades under the business name of **Ben La Concorde**. He is a National of the Democratic Republic of Congo (DRC). His business is in the procurement of goods for clients which he imports into DRC.
2. The Plaintiff has filed this case against **Scardale Investment Ltd** (the 1st Defendant) and **Ruth Otieno** (the 2nd Defendant) the Plaintiff's claim against those two Defendants is for judgment jointly and severally for USD 133,567 for goods paid for but not delivered by the Defendants' and judgment, jointly and severally, for USD 150,000 being damages that the Plaintiff suffered.
3. This case came up for hearing on 8th July 2019. The Defendants failed to attend Court on that day and the case proceeded in their absence. In the circumstances, the Defendants' defence was unsubstantiated and the defence then does fail. See the case **SHANEEBAL LIMITED V COUNTY GOVERNMENT OF MACHAKOS [2018] eKLR**.
4. The Plaintiff testified at the trial and was cross-examined by Counsel for the Defendants.
5. The Plaintiff's case is that in 2013 he entered into a contract with the Defendants for the Defendants to supply rice. This rice was to be imported into DRC to be supplied to Brasserie Simba Sarl, a local brewery in Lubumbashi DRC. The rice was to be used by the brewer to brew beer. The Plaintiff stated that the rice was not available locally in DRC.
6. The 2nd Defendant agreed to supply the Plaintiff with rice. In this regard the 2nd Defendant provided the Plaintiff with an invoice and proforma invoice both dated 9th October, 2013 for USD 119,520. Those invoices were for 150kg rice which the 2nd Defendant was to deliver in 30 days. The Plaintiff stated that the 2nd Defendant, informed him that she required payment of the invoice before delivery was done. The Plaintiff produced before Court evidence of transfer made through Central Bank Congo into the 1st Defendant's account of USD 119,520.
7. The Plaintiff stated that the rice was not delivered as agreed but was delivered after January 2014. On receiving delivery the Plaintiff found that there was a short fall of 31,475kg and out of the quantity that was delivered some of the rice was destroyed by rain, which rendered it unfit for human consumption. The Plaintiff stated that on the 2nd Defendant being informed she undertook to compensate the Plaintiff with delivery of rice for the value of USD 25,079.
8. The Plaintiff entered into another contract for the Defendants to supply 240 metric tonnes of rice for supply to the brewer. On the Defendant raising invoice for that supply the Plaintiff paid the Defendant USD 165,616. This payment was also authorized by Central Bank of Congo. It is the Plaintiff's case that the Defendant failed to supply the second consignment of rice, as ordered, but supplied only 89 metric tonnes.
9. The Plaintiff stated that the Central Bank of Congo imposed a fine on him because he did not prove importation of rice equivalent to the money wired out into the Defendants' account. That this failure was a breach of that Central Bank of Congo Rules.

10. That because the Plaintiff was unable to supply, to the brewer, the rice as contracted, this contract with the brewer was terminated.

11. The Plaintiff prayed for judgment against the Defendants for USD 133, 567 as refund for money paid to the Defendants for which no rice was delivered; judgment for 25% fine imposed on him by the Central Bank of Congo; and judgment for expenses the Plaintiff incurred as result of Defendants' failure to deliver the rice.

ANALYSIS

12. The Plaintiff's evidence was not contradicted by the Defendants who failed to attend Court for trial.

13. The Plaintiff proved on a balance of a probability that he sent money to the Defendants in two payments. The Plaintiff's evidence that the Defendants failed to deliver rice valued at USD 133, 567 was not controverted by the Defendants. That claim is therefore prove. The Plaintiff however failed to prove payment of the fine by the Central Bank of Congo. This is because the Plaintiff relied on a document that was written in French, to prove this claim. There being no translation of this document, provided to the Court, this Court cannot rely on such document. There was also no proof of the expense the Plaintiff incurred. In other words there was no documentary evidence to prove that claim.

CONCLUSION

14. The Plaintiff's claim for judgment for USD 133,567 is proved on required standard of proof and judgment is entered for that amount. Since the Plaintiff has substantially succeeded in his claim the Plaintiff is entitled to the costs of the suit.

15. In the end there shall be judgment for the Plaintiff against both Defendants, jointly and severally as follows:

a. For USD 133,567 plus interest at Court rate from the date of filing suit until payment in full.

b. The Plaintiff is awarded costs of the suit.

DATED, SIGNED and DELIVERED at NAIROBI this 29TH day of NOVEMBER, 2019.

MARY KASANGO

JUDGE

Judgment Read and Delivered in Open Court in the presence of:

Sophie.....COURT ASSISTANT

.....FOR THE PLAINTIFF

.....FOR THE 1ST DEFENDANT

.....FOR THE 2ND DEFENDANT