REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. 256 OF 2003

PROLINE SUPAQUICK LIMITED.....PLAINTIFF

-VERSUS-

KENYA OIL COMPANY LIMITED.....DEFENDANT

JUDGMENT

1. The Plaintiff, **Proline Supaquick Limited** is a limited liability company, registered under the Companies Act. **Kenya Oil Company Limited**; which subsequently, in the year 2003, changed its name to **Kenol Kobil Limited**; is the Defendant. The Defendant is also a Limited Liability Company registered under the companies Act.

2. It is not denied that on 14th June 2002 the parties in this case entered into a Licence agreement by which the Defendant granted the Plaintiff licence to carry on the business of selling the Defendant's fuel, Lubricants and other products. In other words the Plaintiff was Licenced by the Defendant to carry out business of rendering and supplying such services and commodities as are commonly rendered and sold at petrol filling and services stations. The Plaintiff carried out that business at the Defendant's premises on Thika Road- Nairobi.

3. The plaintiff has filed this case seeking judgment against the Defendant for Ksh 2,098,777.35. It is the Plaintiff case, as pleaded in the plaint, that parties maintained their business relationship until October 2002 when the Plaintiff surrendered the petrol station to the Defendant. At the time of handing over that petrol station, the Plaintiff pleaded that the Defendant was holding a deposit of Ksh 2,098,777.35 to its credit. The Plaintiff further pleaded that despite demand to the Defendant, the Defendant had failed/neglected to refund the said amount to the Plaintiff. The Plaintiff therefore prayed for judgment of Ksh 2,098,777.35 plus costs and interest.

4. The Defendant, by its defence filed in court on 30th May 2003 denied the Plaintiff's claim. It is necessary, in my view, to reproduce part of that defence as follows:

> **a)** ***The Defendant denies owing to the Plaintiff the sum of ksh 2,098,777.35 or any part thereof as alleged or at all***;
>
> ***b) In or around October 2002 the Defendant owed to the Plaintiff a sum of Ksh 2,000,000.00 when by an agreement between parties hereto the said amount was transferred to the credit of the Plaintiff's associated Company, Chief petroleum Limited, with the Plaintiff;***
>
> ***c) The Plaintiff has in accordance with the said agreement given credit for the said amount to the Plaintiff's associated Company and nothing is now due and payable to the Plaintiff;***
>
> ***d) Save as herein above expressly admitted in Defendant terms each and every allegation made in the Plaintiff as if the same were set out herein and traversed seriatim.***

THE EVIDENCE

5. The Plaintiff relied on the evidence of Sos Peter Oluoch Mukwana, the Plaintiff's accountant. His evidence was that the Plaintiff and the Defendant had a business relationship whereby the Plaintiff operated a petrol station owned by the Defendant. That business relationship was terminated on 18th October 2002 when the Plaintiff surrendered the petrol station. At the time of handing over, he stated that, the Defendant was holding the Plaintiff's security deposit of Ksh 2,098,777.35, which was refundable to the Plaintiff. The Plaintiff produced in evidence of its account statement with the Defendant dated 18th October 2002 which reflected an amount of credit, to the Plaintiff of Ksh 154,777.35.

6. The Plaintiff's witness further stated that on 11th October 2002 the Plaintiff received fuel that the Defendant intended to be delivered to another petrol station in Sagana. The Defendant held the transporter liable for the value of that fuel, being Ksh 574,000.00. The Plaintiff's

witness stated that it directly paid the transporter that amount of Ksh 574,000.00 and that despite having made that payment the Defendant deducted from the Plaintiff's security deposit the same amount of Ksh 574,000.00. It is the Plaintiff's case that, that resulted in double payment, by it, for that fuel. The Plaintiff therefore claims that amount of Ksh 574,000.00 from the Defendant. It is that amount of ksh 574,000.00 plus the security deposit of Ksh 1,524,777.35 that makes up the amount of Ksh 2,098,777.35, the Plaintiff seeks judgment in this case.

7. The defence case was led by the evidence of Clara Jepkorir, the Defendant's retail supervisor. This witness confirmed that the Plaintiff's dealership licence had been terminated. The handing over of the petrol station was on 22nd October 2002. This witness denied that the Plaintiff at any time paid to the Defendant a security deposit, as alleged by the Plaintiff. According to this witness there is no amount due and payable to the Plaintiff. This is what the witness stated in evidence in chief:

> ***"the Plaintiff did not at any time pay a security deposit to the Defendant I have not seen any evidence of such payment. The Plaintiff had a temporary financial security given by the Plaintiff's associated company to offset debts in its accounts, if any or at all for the Plaintiff's associated company, Chief Petroleum Limited. The security was transferrable back to said Chief Petroleum Limited. The Plaintiff accordingly gave credit to the said Chief Petroleum Limited after making any deductions it was authorized to do on account of the dealership agreement. There is nothing due to be paid to the Plaintiff."***

ANALYSIS

8. There is in my view only one issue which arises from the pleadings before court. That one issue this: is the Plaintiff entitled to be refunded, by the Defendant Ksh 2,098,777.25?

9. As stated before it is admitted by both parties that there existed a business relationship between them which provided for the Defendant to run the Defendant's petrol station. That relationship was guided by the licence agreement made on 14th June 2002. That agreement under paragraph 10 provided that the Plaintiff, at the time of signing that agreement, would provide Ksh 2.5 as security deposit. That paragraph is in the following terms:

> "***the Licence shall simultaneously with the signing of this Agreement deposit with the Company a sum of Ksh 5,000,000.00 (Five Million shillings Only) out of which Ksh 2,500,000.00 (Two Million Five Hundred Thousand Only) shall be held for initial product while Ksh 2,500,000.00(Two Million Five Hundred Thousand Only) shall be held as a security deposit for the payment of any and/or all those amounts which may from time be owing by the Licensee to the Company and for the execution of the Licensee's covenants herein contained, and the Licensee hereby irrevocably and unconditionally authorizes the Company to debit at its sole discretion, the aforesaid deposit by any amount so due to the Company."***

10. The Plaintiff produced an account statement prepared by the Defendant on 18th October 2002 which reflected a credit balance in favour of the Plaintiff for Ksh 1,524,777,35. The Defendant's witness although acknowledging that the statement emanated from the Defendant's office she however stated that the Defendant had not authorized its release, that it was an internal document of the Defendant. According to the defence witness the Plaintiff did not pay the security deposit reflected in that statement of account, but that rather the security deposit was provided by Plaintiff's associate Company called Chief. There was however no documentary evidence to satisfactorily prove what the witness stated. There was no evidence showing a transaction where such a company called Chief paid on half of the Plaintiff the security deposit.

11. The Defendant's testimony through its witness Clara Jepkorir, went contrary to the defence filed herein. To reiterate the Defendant by its defence admitted that it owed the Plaintiff Ksh 2 Million but the Defendant pleaded that amount, by Agreement, was credited to Plaintiff's Associated Company.

12. It is rudimentary that the Plaintiff company was a separate legal entity to another company, such as Chief; eve if the two had the same directors. That in my view is trite. That is why the terminology by the Defendant of 'Associate Company' is lost to me. In the case ***Brecland Group Holdings Ltd –vs- London*** and ***Suffolk properties Ltd (1988) 4 BCC 542*** the learned judge stated;

> ***"wholly in conflict with it. I would cite only briefly also the well know decision in John Shaw & Son (Salford) Ltd –vs- Shaw & Another [1935] 2 KB 113, where Greer L. J. at p 134, observes:***
>
> > ***"a Company is an entity distinct alike from its shareholders and its directors. Some of its powers may, according to its articles, be exercised by directors; certain other powers may be reserved for the shareholders in general meeting. If powers of management are vested in the directors, they and they alone can exercise those powers. The only way in which the general body of shareholders can control the exercise of the powers vested by the articles in the powers vested by the articles in the directors is by altering their articles…"***

13. Since the Plaintiff has its own legal entity the Defendant had the burden to prove that the transfer of Plaintiff's security deposit was authorized by a resolution of the Plaintiff Company Board of Directors. The Plaintiff's articles of association provide that the acts of the Plaintiff's directors are subject to control and regulation of the general meeting. The question that arises then is, did the alleged authorization for the Plaintiff's security deposit to be transferred to another company receive the Plaintiff's general meeting approval. The burden of proof lay with the Defendant to show their act of transferring the money was so approved.

14. But having stated so there is no evidence before court that the Defendant did indeed transfer such money to a company called Chief. None at all. Such transfer remains mere statement by the Defendant's witness where she stated:

"After termination of Plaintiff Ksh 2 million was transferred to Chief."

15. The Plaintiff also claims an amount of Ksh 574,000.00 from the Defendant which the Plaintiff stated was a double payment for fuel. Although the Defendant submission was that the Plaintiff did not prove that it paid that amount, the Defendant's witness did confirm the Plaintiff paid. This is what that witness said:

"There is an invoice of the amount that 'hit' customer's account – he was to pay Ksh.574,000.00. Plaintiff paid"

16. The Plaintiff's case in regard to that sum was that it paid Ksh 574,000.00 directly to the transporter of the fuel, and the Defendant, who had previously declined to pay the transporter of the fuel, subsequently also paid, deducting that amount from the Plaintiff's security deposit.

17. I can confirm that the Defendant's internal account statement, of the Plaintiff's account, reflects a debit of Ksh 574,000.00. That being so and because the Defendant's witness admitted that the Plaintiff paid the transporter of fuel, the Defendant wrongly deducted the Plaintiff's account to pay that transporter. It resulted in double payment effected to the transporter. I do therefore find that the Plaintiff is liable to be refunded by the Defendant the amount wrongly paid by the Defendant to the transporter of fuel.

18. The Plaintiff's claim therefore succeeds. I wish however to respond to the submissions of the Defendant that because the Plaintiff's applications for judgment on admission and for summary judgment were dismissed the issue of the Defendant's admission of the Plaintiff's claim in the defence, is *res judicata.* I beg to differ from Defendant's submission. The Rulings to those two applications is that the prayers were declined because the learned judges were of the view that the legal issue raised by the parties required full hearing to be conducted. Those sentiments were captured in the Ruling of **Justice Njagi** (as he then was) where the learned Judge stated:

"Apart from interpreting the documents, a point of law has also arisen in this matter. Assuming that there was an agreement to the effect that the debt owed to the Plaintiff be paid to a third party, did the Plaintiff's director who allegedly agreed to that arrangement have authority to bind the company. The point is that this is a serious point of law which was raised by the plaintiff itself and which should be sorted out before judgment on admission can be justified."

CONCLUSION

19. In view of the finding hereof that the Plaintiff proved on a balance of probability, by producing its statement of account prepared by the Defendant, that it was owed Ksh 2,098,777.35; because the Defendant failed to show that there was proper authority to transfer those funds to another entity; and much more because the Defendant did not prove the actual transfer of those funds to another entity, the Plaintiff's claim does succeed. It also succeeds because the Defendant by its defence admitted being indebted to the Plaintiff to the tune of Ksh 2 million.

20. The Defendant having held the Plaintiff's money, the Plaintiff is entitled to interest on that amount, and having succeeded in its claim the Plaintiff is also entitled to costs of this suit.

21. The judgment of this court is as follows:

a) Judgment is herby entered in favour of the Plaintiff for Ksh 2,098,777.35 plus interest at court rate from the date of filing suit until payment in full;

b) The Plaintiff is awarded costs of this suit.

DATED and SIGNED at NAIROBI this 29th day of November 2019.

MARY KASANGO

JUDGE

Ruling Read in Open Court in the presence of:

Sophie.....COURT ASSISTANT

.....FOR THE PLAINTIFF

.....FOR THE DEFENDANT