



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MILIMANI COMMERCIAL COURTS**

**CIVIL SUIT NO. 441 OF 2011**

**CHRISTIAAN GEYSEMANS.....1<sup>ST</sup> PLAINTIFF**

**DYNATEC UGANDA LIMITED.....2<sup>ND</sup> PLAINTIFF**

**VS.**

**GEORGE NJOROGE KARIUKI.....1<sup>ST</sup> DEFENDANT**

**WILFRED LUKOBA OYEYO.....2<sup>ND</sup> DEFENDANT**

**EAST AFRICA DATA HANDLERS LTD.....3<sup>RD</sup> DEFENDANT**

**EAST AFRICA DATA HANDLERS.....4<sup>TH</sup> DEFENDANT**

**JUDGEMENT**

1. Laptops and Mobile Phone Handsets are stolen or otherwise lost from time to time. East African Data Handlers Limited (EADH LTD or the 3<sup>rd</sup> Defendant) boast as being the author, owner and holder of a theft tracking device and software aptly known as "Ujanja" which is a device and software to track stolen or lost Laptops or Mobile Phone Handsets.

2. The Claim by Christiaan Geysmans (1<sup>st</sup> Plaintiff or Christiaan) and Dynatec Uganda Limited (2<sup>nd</sup> plaintiff or Dynatec) is in respect to what they allege was a failed Contract for the supply of 1,000 Ujanja software licences.

3. It is asserted by Christiaan that on or about 8<sup>th</sup> January 2010, he held a meeting with George Njoroge Kariuki (Kariuki or the 1<sup>st</sup> Defendant) in which it was agreed that Kariuki would supply a thousand units of Ujanja Laptops at a total cost of Khs.3.5 million. Subsequently, on 15<sup>th</sup> January 2010, Wilfred Lukoba Oyeyo (Oyeyo or the 1<sup>st</sup> Defendant) raised an invoice in respect to the said Laptops demanding payment of Khs. 3.5 million from Christiaan.

4. The said invoice was paid by Christiaan in two tranches. One on 21<sup>st</sup> January 2010 and another on 25<sup>th</sup> March 2010.

5. The Plaintiff allege that on or around 9<sup>th</sup> March 2010, Dynatec was registered in Uganda as a Limited Liability Company. I suppose the Plaintiffs meant that Dynatec was duly incorporated.

6. That on or around 24<sup>th</sup> March 2018, Dynatec and Oyeyo entered into a Memorandum of Understanding which stipulated the manner in which the business relationship between the two parties will be governed.

7. The grievance of the Plaintiffs is that the Defendants have failed to deliver the 1000 units of Ujanja Laptops which has caused them loss. The loss include the cancellation of confirmed Orders from 3<sup>rd</sup> parties which are valued at Khs.130,645,000.

8. In an amended Plaintiff filed on 18<sup>th</sup> November 2013, the Plaintiffs seek the following prayers:-

1. Specific Performance for the delivery of 1000 units of Ujanja Laptops to the Plaintiffs.

2. In the alternative to (a) the sum of KES 3,500,000 jointly and severally against the Defendant.

3. The sum of KES 130,645,000.00 against the 1<sup>st</sup> and 3<sup>rd</sup> Defendant jointly and severally being special damages for revenue anticipated from actual orders cancelled.

4. Interest on the above sum at Court rates from the date of filing suit until payment in full.

5. Costs of this suit together with interest thereon at Court rates from the date of judgment until payment in full.

9. On behalf of the Plaintiffs, Christiaan testified in which he fleshed out what has been outlined above. An indepth evaluation of his evidence is discussed in the latter part of this Decision.

10. The Defendants filed a joint Amended Defence on 11<sup>th</sup> December 2013. The highlights are as follows. EADH Limited avers that it was and is the sole owner and holder of exclusive rights to sell Laptops and Mobile phone antitheft tracking software under the brand name UJANJA. It is averred that East Africa Data Handlers (EADH or the 4<sup>th</sup> Defendant) has long ceased to exist.

11. It is denied that the Defendants ever entered into an Agreement either jointly or severally with the Plaintiffs. And that any Agreement entered between three parties was in the individual capacities and did not impose any legal responsibilities on the Defendants.

12. It is further asserted that Dynatec is not duly registered as a Legal Entity and lacks any authority to sue. In addition that any Agreement entered on 24<sup>th</sup> March 2010 was between Subscribers to some prospective Companies who are the parties with contractual obligations therein.

13. Otherwise the Defendants deny the Plaintiffs' Claim.

14. Kariuki testified on behalf of the Defendants and his evidence must necessarily receive detailed analysis at some point in this Decision. For now it is important to note that Mr. Kariuki acknowledged that EADH Ltd invoiced Christiaan for the sum of Khs.3,500,000 and that the same was paid. However, it his insistence that Christiaan was acting for Maisha Investments Limited (Maisha) and the invoice and payment was in respect to the Contract entered between EADH Ltd and MAISHA. And further no payment was ever invoiced or received by EADH Ltd in regard to the Contract between it and Dynatec.

15. On 17<sup>th</sup> September 2012, the Plaintiffs proposed 8 issues for determination. The Defendants made their proposals in a list filed on 30<sup>th</sup> October 2012. On consideration of the issues proposed by the parties, taken together and in the context of the Pleadings and evidence adduced, the Court sets out the following questions as deserving its determination:-

(i) Did Christiaan and/or Dynatec jointly or severally enter into a Contract with all the Defendants or any of them for the purchase of 1000 Ujanja Software licences?

(ii) If so, did Christiaan and/or Dynatec tender payment for the said licences?

(iii) Were the licences delivered to Christiaan and/or Dynatec?

(iv) If all or any of the Defendants is guilty of Breach of Contract, what loss, if any has Christiaan and/or Dynatec proved?

(v) What are the appropriate Orders on costs?

16. There is common evidence that on 6<sup>th</sup> January 2010 a Memorandum of Understanding was entered between a party described as Dynatec Uganda Ltd on the one hand and EADH Ltd as the second party. Although it must be observed that at the execution page, the second party is described as East African Data Handlers (Uganda) Ltd. Mr. Kariuki speaking on behalf of the Defendants, explains that it was contemplated that both parties to the Memorandum of Understanding would be incorporated in Uganda.

17. The evidence is that Dynatec was duly incorporated as a limited liability Company under The Companies Act of Uganda on 26<sup>th</sup> March 2010 (See Certificate of Incorporation, P Exhibit page 14). Christiaan concedes as much in his evidence.

18. It is therefore a fact that at the time of the purported execution of the Memorandum of Understanding on 6<sup>th</sup> January 2010, Dynatec did not exist. Dynatec was not a Legal Entity! For that reason no Legal Right can accrue to Dynatec from the said Memorandum of Understanding unless it is demonstrated that East Africa Data Handlers (Uganda) Limited (*if incorporated at the time of the Memorandum or later*) held itself out as being bound by the terms of the Memorandum. No such evidence was forthcoming.

19. The inescapable conclusion to be drawn is that Dynatec has no proper cause of action against any of the Defendants herein.

20. In respect to Christiaan he testified that,

*"We were selling up Dynatec Uganda. At the time I ordered 1000 units for Khs.3,500,000 in my name".*

There is uncontroversial evidence that when EADH Ltd raised an invoice it did so in the name of Christiaan (P Exhibit page 7). Undisputed

evidence as well is that the invoice value was fully settled through payments made personally by Christiaan on 21<sup>st</sup> January 2010 (P Exhibit page 8) and 24<sup>th</sup> March 2010 (P Exhibit page 9). That payment came from Christiaan is supported by copies of Bank Statements of Christiaan's Account (P Exhibit 2 pages 2-3).

21. EADH Limited concedes that the payments of Khs. 3,500,000 was made to it. The evidence of Mr. Kariuki repeatedly speaks to this. For example he states,

*“The 1<sup>st</sup> Plaintiff paid the 3<sup>rd</sup> Defendant as follows;-*

*21<sup>st</sup> January 2010 – Kshs.1,750,000*

*24<sup>th</sup> March 2010 – Kshs.1,750,000”*

Christiaan is the 1<sup>st</sup> Plaintiff and EADH Ltd is the 3<sup>rd</sup> Defendant.

22. Christiaan asserts and gave testimony that he never received the product for which he had tendered payment.

23. EADH Ltd tell a different story. Mr. Kariuki's testimony is that on and about January 2010 an understanding was reached between Christiaan and a Mrs. Olok on the one hand and EADH on the other hand. The former were to have exclusive distribution rights for the sale of the Ujanja product in Uganda. Subsequently a non-disclosure agreement was signed between EADH and Christiaan and a Company by the name Maisha Investment Ltd. This was followed by a Memorandum of Understanding and Business Partnership MOI between EADH Ltd on the one hand and Maisha Investment on the other. In the Memorandum, Christiaan and Mrs. Olok execute it on behalf of Maisha Investment.

24. His testimony is that the invoice of Khs.3,500,000 raised in the name of Christiaan was for Maisha as Christiaan was acting for Maisha. And that Maisha were provided with the software products. He further added,

*“Maisha does not dispute this. No dispute by Olok that products not given”.*

As to the connection between Maisha and Christian, Kariuki's evidence was that Maisha was the Plaintiffs' entity and hence the payment from him.

25. Whose account is the Court to believe? If the Maisha angle is true then EADH Ltd would have a formidable answer to the claim by Christiaan. Yet there is something curious about it!

26. The Defence of 8<sup>th</sup> November 2011 does not, either expressly or indirectly, raise the issue of Maisha. Again, in the 2 Witness Statements filed on 30<sup>th</sup> October 2012 on behalf of EADH Ltd, nothing is said of Maisha. This curious failure by EADH Ltd to raise the alleged transaction with Maisha in both the Defence and initial Witness Statements attracted the attention of Counsel for the Christiaan who raised it when cross examining Mr. Kariuki.

27. Further still, the Maisha Defence is not raised when EADH Ltd was making an answer to the Plaintiffs' Motion of 23<sup>rd</sup> April 2012 in which the Plaintiffs sought Summary Judgement on their Claim.

28. Again, not a single question in respect to the alleged Maisha transaction is fielded to Christiaan during cross-examination.

29. The first time this features is on 30<sup>th</sup> May 2017 (some two years after Christiaan had completed his testimony) in a further Witness Statement by Kariuki.

30. This Court must find that upto the point the Plaintiffs closed their case, they were never confronted with the Maisha Defence. For that reason Christiaan has not been afforded a fair opportunity to react to that Defence. It would seem to be an afterthought or otherwise EADH Ltd must blame itself for failing to raise it timeously. For that reason this Court believes the account of Christiaan which must stand uncontroverted.

31. The account is that an invoice for Khs.3,500,000 was raised in his name for the purchase of 1000 software licences. The evidence is that he tendered full payment to EADH Ltd against that invoice. There is no evidence that the software licences or Laptops were delivered to Christiaan.

32. As to the other Defendants (1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup>), Christian has not made out a case against any of them.

33. What remedy is available to Christiaan against EADH Limited? In addition to a Claim of Khs.130,645,000/00 as damages for lost revenue, the Plaintiffs had sought an order for Specific Performance or refund of the Khs.3,500,000 as alternative. In the final submissions by Christiaan he abandons the Claim for Specific Performance and explains as follows:-

*“The remedy of Specific Performance is now untenable considering the time lapse since the breach occurred”.*

34. In respect to a refund of the payment, this Court finds no difficulty in making that Order. It would be an affront to equitable conscience for EADH Ltd to be allowed to keep the money yet it never delivered what it was paid for to deliver. To allow it to keep money in those circumstances would be to unjustly enrich it.

35. Turning to lost revenue, I must say that Christiaan did a poor job at attempting to prove it. There was testimony that in anticipation of a roll out of the product in Uganda an official launch was done. The launch is said to have cost some Kshs.1,500,000/=, time and effort. Unfortunately, for Christiaan, no evidence of the cost was tendered. In the nature of our litigation, you only get what your proof.

36. There was evidence that the Plaintiffs had obtained two Orders from entities known as Triangle Marketing ltd and second Life Ugand Ltd in the sum of Uganda Shillings 53,700,000. This according to Christiaan would be equivalent to Kshs.4,400,000. The Plaintiffs Claim this amount. But even if it is to be believed that the Plaintiff lost these Orders, there is no proof of the profit these they may have generated. It is not logical to claim the value of the Order when it must be serviced at an expense! That claim fails.

37. Ultimately I make the following orders:-

37.1 The Claim by the 2<sup>nd</sup> Plaintiff fails as against all the Defendants with costs.

37.2 The Claim by the 1<sup>st</sup> Plaintiff fails as against the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Defendants with costs.

37.3 Judgement is entered in favour of the 1<sup>st</sup> Plaintiff against the 3<sup>rd</sup> Defendant for the sum of Khs.3,500,000 with interest thereon at Court rates from the date of filing suit until payment in full. In addition the 1<sup>st</sup> Plaintiff shall have costs on this amount.

38. Those are the Orders of the Court.

**Dated, Signed and Delivered in Court at Nairobi this 19<sup>th</sup> Day of April, 2018.**

**F. TUIYOTT**

**JUDGE**

**PRESENT:**

Maangi for Defendant

N/A for Plaintiff

Nixon - Court Assistant