REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CIVIL CASE NO. 8 OF 2016

LEYSTAN HOLDINGS LIMITED.....................................PLAINTIFF

VERSUS

EAST AFRICAN BREWERIES LTD.......................1ST DEFENDANT

KENYA BREWERIES LIMITED............................2ND DEFENDANT

JUDGMENT

1. The dispute in this case is a cautionary tale why parties should never embark on multi-million, long term business relationships without, first, reducing their agreement into writing. It is testament to the oft-told lesson that extreme informality in business relationships of substantial import can be extremely costly to the parties.

2. It is common among the parties that sometime in 2012, they orally agreed to enter into a haulage and transport services contract. The Plaintiff was to provide the haulage and transport services primarily for the Defendants' keg beer and empty bottles from various destinations; and the Defendants were to pay for the service at an agreed rate. The rate agreed for the services is the real controversy in the case. I will return to the controversy shortly.

3. Though the agreement was, at first, oral, there was a clear understanding that the parties will reduce it into writing later. This they did and the formal agreement, though undated, is not disputed by either parties. It is styled as an "Agreement for the Provision of Transport Services" between the Defendants and the Plaintiff (hereinafter "Written Agreement"). It appoints March 28, 2012 as the Commencement Date for the Agreement.

4. Though the Written Agreement contains a rather watertight "Entire Agreement Clause" (in Clause 26.4 of the Written Agreement) which states categorically that the Written Agreement and the Schedules incorporated therein constitute the entire contract between the parties and superseded "all proposals and prior agreements, arrangements and understandings between the parties related to the subject matter", both parties were in agreement that the parties varied the Written Agreement after it had been executed regarding Schedule 3 which spelt out the agreed rates to be paid for the transportation services. Again, the controversy is on what the new modified terms were.

5. In any event, both before and after the execution of the Written Agreement, the Defendants requested the Plaintiff to supply haulage and transport services as per the agreement; and the Plaintiff obliged. The Plaintiff then billed the Defendants for the services itemizing the services provided. The Defendants duly paid the invoiced amounts. This happy mutual relationship persisted until around September, 2013 when the Defendant stopped paying any further invoices. By that time the relationship between the parties had so irretrievably broken down that the Plaintiff was not accepting any more Purchase Orders from the Defendants.

6. The Plaintiff claims that at the time the relationship broke down, the Defendants owed it Kshs. 87,765,246.36 in properly invoiced amounts for haulage and transport services offered to the Defendant as per their agreement. The Defendants say that they owe nothing – and that they paid for all services offered after taking into account the amounts they set off after their discovered fraudulent and erroneous billings by the Plaintiff which had resulted in them over-paying the Plaintiff Kshs. 85,249,881.88 during the pendency of the agreement. The Defendants say that after exercising their right of set off pursuant to Clause 5.4 of the Written Agreement, they deducted the amount overpaid (Kshs. 85,249,881.88) and then paid the Plaintiff the balance of Kshs. 7,534,950 which was undisputed.

7. As stated above, the real dispute the parties is what the agreed rate for the haulage transportation services between the parties was. The Plaintiff impleaded that the agreement between the parties was that the Plaintiff would transport the Defendants' keg beer in batches of 200 barrels of keg beer. There was an agreement between the parties, impleaded the Plaintiff, that each time the Plaintiff transported batches of 400 keg beer, it would split the batches into two consignments and charge separately for each consignment of 200 batches even though it was understood that the 400 batches would, in fact, be transported in one fourty-foot trailer.

8. The Plaintiff's witness, Mr. Robert Njagi Kariuki was the Finance Manager of the Plaintiff. He testified that it was a dickered term of the oral contract between the parties that the agreed rates were "*purely for delivery of 200 barrels irrespective of the vehicle that delivere[d] it…*

[meaning that] there was also an agreement that we will still use a trailer and that with a trailer [the Plaintiff] would load two batches of the goods" and hence carry 400 barrels in one trailer. In such a case, Mr. Njagi testified, the Plaintiff would bill for two 200-barrels batches as per the agreement – even though it was understood that only one 40-foot trailer was in fact used to transport the goods.

9. Mr. Njagi insisted that everyone involved at the Defendant Companies understood that this was the billing system and rates agreed between the parties. To illustrate this, Mr. Njagi took the Court through the elaborate system which the parties used to request for service; generate and process documentation; verify consignment and match it to the vehicle delivering it as part of the security process; and a reverse process of verification after delivery was done when the Plaintiff issued its own invoice billing for the services offered.

10. According to Mr. Njagi, each time there was a delivery to be done, the Defendants would inform the Plaintiff and the Plaintiff would indicate the availability of vehicles to do the delivery. The next step would be for the Defendants to generate their delivery invoice in quadruplicate ("Defendants' Delivery Invoice"). The four copies would then undergo all the security checks before DHL loaded the consignment to the correct vehicle matching the vehicle indicated in the Defendants' Delivery Invoice.

11. Mr. Njagi testified that each of the Defendants' Delivery Invoice contained the Defendant's Invoice number; the date the delivery left the Defendant's premises; the particulars of the distributor to whom the consignment was being sent; the quantity; the registration details of the vehicle doing the delivery; and the name of the haulier. All these dates needed to match in order for DHL to load the consignment and in order for the security at the Defendants' premises to allow the vehicle carrying the consignment to leave the Defendants' premises.

12. Mr. Njagi's testimony was that pursuant to the Plaintiff's agreement with the Defendants, every time there was a consignment of 400 barrels to be delivered and the Plaintiff had a 40-foot trailer available to do the delivery, the Defendants' agents would split the Defendants' Delivery Invoice into two invoices of 200 barrels each. Hence, though the 400 barrels would eventually be loaded onto the same 40-foot trailer, the Plaintiff would end up billing the Defendants for two separate 200-barrels consignments instead of one 400 barrels consignment. Again, Mr. Njagi insisted that this was an express agreement between the Plaintiff and the Defendants. He also insisted that the Defendants were not only aware of these billing system but approved it by paying the amounts billed for the entire duration of the contract until they suddenly froze the accounts. Mr. Njagi insisted that the Defendants continued to pay for all the Plaintiffs' invoices raised even after painstaking verification to confirm that the services had been offered and that all the specifics aligned.

13. Consequently, the Plaintiffs argue that not only was there an agreement to split 400 barrels consignments into two and bill them as though they were two separate 200 barrels consignments but that the Defendants knowingly and repeatedly affirmed this to be the agreement between the parties even when it had plenty of opportunities to contest this. As such, the Defendants should be estopped from denying that this was, indeed, the agreement.

14. Additionally, during cross-examination, Mr. Njagi testified that in addition to the general rates agreed between the Plaintiff and the Defendants, sometimes the parties would orally agree on the specific rate to apply to a specific consignment. This would happen, for example, where the Defendants asked the Plaintiff to take over delivery of a consignment which was not in its usual route. This ad hoc oral agreements on rates, Mr. Njagi testified, explained some of the discrepancies in rates the Plaintiff used to bill the Defendants. However, Mr. Njagi insisted that the fact that the rates had been paid after the elaborate system of cross-checking and verification by the Defendants would be proof that those rates were pre-agreed by the parties prior to the services being offered.

15. In short, the Plaintiff's claim is that the Defendants decision to challenge the rates applied for the delivery of the consignments was an afterthought; and in bad faith in a bid to deny the Plaintiff payment for services honestly offered at rates agreed by the parties.

16. The Defendants narrative was quite the opposite.

17. The Defendants insist that there was never an agreement between the Plaintiff and the Defendants to split deliveries made in 40-foot trailers so that they are invoiced as two separate consignments. Ms. Olivia Lamenya, the Contracts Manager, Kegs and Spirits at the Kenya Breweries Limited, testified as DW1. She said that it would not make any logical or economic sense for the Defendants to have agreed to split deliveries to be made in a single track in that way. Olivia's testimony was that the Defendants had agreed with the Plaintiff to the transportation services using the DHL Rates Cards – which was the rates used by all other transporters.

18. Olivia testified that the rates indicated in the DHL Rate Card was the card which the parties had agreed at the inception of the agreement and which was to be used throughout. However, she conceded that during the writing of the contract – which followed the oral contract phase – the wrong rates were included at Schedule 3 of the Written Agreement. As a result, the rates indicated in Schedule 3 were never used. Instead, the parties understood that the DHL Rate Card rates would be used. This is because the rates in Schedule 3 were too low and, therefore, uneconomical for the Plaintiff.

19. Olivia sought to dispel the notion that the Defendants' conduct of paying against amounts invoiced by the Plaintiff for services offered between March, 2012 and mid-2013 demonstrated that the Defendants had acquiesced to the Plaintiff's system of split-billing for 40-foot trailers' deliveries. She explained that the order process begins with a distributor in the field placing an order which could to the Defendants' team known as Field Logistics Coordinators (FLCs). The order would be captured in the Defendants' system known as SAP which would trigger the generation of a document known as a Dashboard. The order would then be allocated to a transporter – like the Plaintiff. If the order was too little or too much, then the transporter allocated would point out to the Defendants who would, then, take appropriate action to change the order.

20. According to the testimony of Olivia, the Defendants were clear in all their dealings with transporters that there were two types of trucks – a small truck (20 foot) and a big truck (40 foot). There was a general understanding of how many barrels of kegs would fit on either types of trucks. The idea, though, was that large orders (of 400 barrels) would be allocated to the bigger trucks since it was more economical to do so. However, the Defendants were aware that it was not always possible to transport orders of 400 barrels in a single 40-foot trailer due unavailability of the bigger trailers within the fleet of the specific transporter allocated the delivery. In such cases, Olivia conceded, the transporter would provide two 20-foot trucks to transport the consignment.

21. Hence, testified Olivia, once the FLCs allocated a delivery request from a distributor to a transporter, the transport filed back information on the system on the available truck – including its registration details. Based on the available trucks, the FLCs would then decide if any of the orders needed to be split. Where the transporter populated the dashboard with delivery details in batches of 200 barrels, the FLCs assumed that the transporter had only 20-foot (10 wheeler) trucks available. The FLCs would then split the orders accordingly to match the available trucks.

22. It was Olivia's testimony, therefore, that contrary to the Plaintiff's assertions, it was not the Defendants who were splitting 400 barrels orders but that it was the Plaintiff who was cynically providing feedback in the system to ensure that the FLCs would split the orders. This would, in the end, mean that the Plaintiff would end up charging twice for each 200 barrels consignment while in fact only one truck was used. Olivia was insistent that there was no agreement between the Plaintiff and the Defendants that such splitting was allowed, or even tolerated.

23. Why, then, did the Defendants continue paying against the amounts invoiced by the Plaintiff for more than two years without protesting against the invoicing practice they later objected to? According to Olivia, the Defendants simply did not notice that this was happening. They only became aware the anomalies when they did an internal audit and discovered what they considered serious anomalies: double billing for single truck deliveries for 40-foot trailers. The internal audit was triggered by an ever increasing transport costs for the Defendants which alerted them that something was amiss. It is at this point that the Defendants ordered an investigation; had meetings with the Plaintiff; and ordered a review of both the truck allocation and billing system to prevent a recurrence of the problem. Among other reforms, Olivia testified that the Defendants decided to automate their systems to fill in some of the gaps. Secondly, the Defendants also changed the seating arrangements of the team so that the FLCs doing the order creation can actually have sight of the truck that is being loaded to prevent opportunistic split-ordering. Thirdly, they introduced a new policy in which a minimum number of barrels per transporter was introduced. They also introduced an outbound process which is now in place which is meant to detect such anomalies early and often.

24. The Defendants' primary point of evidence in this dispute is that the Plaintiff was aware that the rates that were to be used in billing was the DHL Rate Card which was, according to the Defendants, brought to their attention. The DHL Rate Card (Exhibited at page 38 of the Defendant's Initial Bundle of Documents) contains separate rates for 20-foot trucks (200 barrels consignments) and 40-foot trailers (400 barrels consignments). These rates, the Defendants insist, were the ones to be used both before and after the Written Agreement was memorialized. To demonstrate that the Plaintiff was aware that these were the correct rates and that, therefore, the use of different rates occasioned by the split-ordering was fraudulent, the Defendants offered the following three pieces of evidence:

> a. First, there was undisputed evidence that showed that some of the time, the Plaintiff charged using the DHL Rates Card meaning that it charged a single enhanced figure for delivery of 400 barrels consignment rather than two separate amounts for 200 barrels consignment. The Defendants included in their documents a Sales Analysis document which was not disputed by the Plaintiff which showed, for example, that on 26/04/2012, the Plaintiff invoiced the Defendants a sum of Kshs. 30,972.11 for delivery of 400 barrels to Embu using a 40-foot trailer. The same document showed, however, that four days later, on 30/04/2012, the Plaintiff split a similar delivery of 400 barrels to the same distributor in Embu into two and charged Kshs. 23,657.50 for each 200 barrels consignment. Yet, the 400 barrels were delivered by the same 40-foot trailer. This meant, for example, that the Defendants ended up paying Kshs. 47,315 for the same 400 barrels delivery to the same distributor that they had paid Kshs. 30,972.11 four days earlier.
>
> b. Second, the Defendants produced an exchange of emails by the parties attaching minutes of a meeting held by their representatives on 18/07/2013 which included a minute that confirms that the Plaintiff had received the DHL Rates Card from Evelyn Mugo. The meeting was attended by, among others, Robert Kariuki (PW1) and Stanley Kiriti (a director of the Plaintiff). Stanley Kiriti received the Draft minutes from a representative of the Defendants and he responded with some modifications. Among the items he did not propose any modification was the following language (appearing at page 190 of the Defendants Initial Bundle of Documents):
>
> *Leystan confirmed that they were aware that Procurement was their point of contact for all rate issues and confirmed having been in communication with Baldwin Onyango and Dan Kipsang. However, they indicated that Evelyn Mugo in Logistics is the one who had given them DHL Rate Card and asked them to invoice against it.*
>
> c. Third, the Defendants called Evelyn Mugo to the stand as DW2. She testified straightforwardly that she gave the Plaintiff the DHL Rates Card and asked them to invoice against it. The Plaintiff's Counsel did not cross-examine or otherwise challenge that direct testimony by Evelyn Mugo.

25. Against these pieces of evidence by the Defendants, the Plaintiff sought to counteract as follows:

> a. Regarding the appearance that the Plaintiff had, indeed used the DHL Rates Card to bill some of the services it had offered, Mr. Njagi explained that in those specific instances they used a different rate (400 barrels rate rather than split order rates) because for that specific order there was an oral agreement between the Plaintiff and the Defendants that the different rate be applied.
>
> b. Regarding the seeming confirmation of receipt of the DHL Rates Card, the Plaintiff denied that the Minutes of the meeting provided any such proof. Mr. Njagi's retort on this point is mainly technical: that the minutes are not signed and are, therefore, not authenticated.

26. I have carefully analysed all the evidence adduced in this trial and sifted through the volumes of documents filed by the parties. In my view, as stated at the beginning of this Judgment, the issue presented is singular: what was the agreed rates for transportation services between the Plaintiff and the Defendants? In particular, did the agreed rate permit order-splitting for 400 barrels consignments of keg beer into two 200 barrels consignments which would then be charged separately rather than as one 400 barrels consignment? If the answer to the second question is in the affirmative, the Plaintiff would prevail in this litigation. If not, the Plaintiff's claim falls flat like a dodo.

27. My view is that the analysis of the evidence above gives clear clues that it is the Defendants' version of the story that is the more credible one when one examines the totality of circumstances in this case. Conversely, my analysis of the evidence had led to the conclusion

that there was neither express nor implied agreement between the Plaintiff and the Defendants to split Defendants' Delivery Invoices of 400 barrels of keg beer to the same distributor into two 200 barrels consignments which would then be charged separately. Neither did I find any evidence that the parties had no agreed rates to charge each delivery by the Plaintiff and that, instead, they agreed on rates on *ad hoc* basis as claimed by the Plaintiff. Finally, I concluded that as a matter of law, payments by the Defendants against the invoices raised by the Plaintiffs did not amount to ratification of the billing practices by the Plaintiffs. Neither did it trigger an equitable estoppel estopping the Defendants from denying that different rates were applicable.

28. My conclusions of fact and law summarized above were informed by the following eight points of analysis.

29. First, the Plaintiff claims that the agreement between it and the Defendants was that it would, unless the contrary is agreed on an *ad hoc* basis, order-split all Defendants' Delivery Invoices of 400 barrels of keg beer. This would seem to be a really pivotal contractual agreement and it appears suspect that it was not reduced into writing either as part of the Written Agreement or even as a separate communication between them. The Plaintiff produced no independent evidence whatsoever that there was any such agreement.

30. Second, even if one were to look past the Entire Agreement Clause of the Written Agreement and contemplate that there was an agreed rates agreement that had survived the oral contract phase into the memorialized agreement, no evidence of that dickered term of the contract was presented to the Court. The only witness for the Plaintiff was Mr. Njagi, the Finance Manager, who did not testify that he was part of the direct negotiations between the Plaintiff and the Defendants at which agreement on the billing method for 400 barrels consignment was reached. Instead, Mr. Njagi testified generally about the agreements between the parties which led the Court to conclude that he was not present during the said negotiations. Mr. Njagi was unable to say who specifically within the Defendant Companies made the agreement on the agreed rates. He was also unable to produce any piece of writing, email, SMS text or other memorialization of the alleged agreement however informal. It appears extremely odd that such a central dickered term of the contract would remain solely oral even as all other aspects of the contract were memorialized.

31. Third, it seems odd that the Plaintiff and the Defendants – two established repeat players in the business – would reach an agreement that the most important dickered term of their contract – namely the price – would be left open and would be fixed on an *ad hoc* basis with every order that is made by the Defendants. This appears even more unlikely when one considers the way in which the orders were, by the Plaintiff's own evidence, generated and executed: without the involvement of any senior management level employees of the Defendant Companies.

32. Fourth, it would appear that the billing method was the central focus of the meeting held between representatives of the Plaintiff and the Defendants on 18/07/2013. Even the suggested modifications to the minutes of the meeting by Mr. Stanley Kiriti, a Director of the Plaintiff enunciates this fact. Yet, if the Plaintiff's position all along was that it was an express term of its contract with the Defendants that it would split orders for delivery of 400 barrels of keg beer to distributors, it is doubly odd that the Plaintiff's representatives at the meeting did not simply point that out to the meeting! If such an agreement indeed existed it would have been put on the table during this meeting. And, there was a natural place for it too. One of the bulleted minutes entitled "Leystan Billing" reads: *Leystan confirmed that they had indeed been billing for two 200 case trucks instead of one 400 case trucks despite making deliveries in a 400 case truck.*

33. Fifth, from the totality of evidence adduced, I am persuaded that the Plaintiff was aware of the DHL Rates Card. This is demonstrated not only by the minutes of the meeting held on 18/07/2013 but also by the fact that they selectively used it in some instances as pointed out by the testimony of Olivia and admitted by Mr. Njagi in cross-examination. Additionally, it is my finding based on the uncontroverted testimony of Ms. Evelyne Mugo that she gave the DHL Rates Card to the Plaintiff and asked them to invoice against it. As noted above, the testimony of Evelyne Mugo in this regard was not challenged. Since the Plaintiff was aware of the DHL Rates Card and was, therefore, aware that it was expected to use those rates in billing, it was fraudulent for it not to do so. At the very least, it was incumbent upon the Plaintiff to bring to the attention of the Defendants that it did not wish to adhere to the supplied rates.

34. Sixth, having looked at the Written Agreement, and, in particular, Paragraph 2.1.1 of Schedule 2 to the Written Agreement, I am persuaded that it is unlikely that the Defendants intended or indeed, agreed to split-order billing for the delivery of 400 barrels of keg beer when it is clear from the Written Agreement that the Defendants intended that fourty-foot truck would be the default truck the Plaintiff would make available for delivery services. Clause 2.1.1 obligates the Plaintiff to provide "*a fleet of a minimum of eleven (11) fourty-foot trucks appropriate for carrying the services*" set out in the Written Agreement. If the contractual intention was that fourty-foot trucks would be the default truck, it would appear illogical that the Defendants would automatically split all Defendants Delivery Invoices into 200 barrels consignments which are meant to fit into twenty-foot trucks. The more likely scenario, in keeping with the Defendants' desire to fit in as much keg beer as possible in each delivery, was that the intention of the parties was that the Plaintiff would, where the amounts ordered by the distributors was above 200 barrels of keg beer, and where the road conditions allowed, use the fourty-foot trucks to make the deliveries and charge as such.

35. Seventh, I am unpersuaded that the payments made by the Defendants against invoices raised by the Plaintiff between March, 2012 and July, 2013 in any way demonstrates existence of an agreement to split 400 barrels delivery orders or ratifies the practice by the Plaintiff. As demonstrated during trial by both parties, the process of generating and verifying a Defendants' Delivery Invoices as well as the process of counter-checking the Plaintiff's Invoice for payment was a complex process in which the latter cross-referenced the former while the former was crucially dependent on information supplied by the Plaintiff as to the availability of trucks of a particular size to do the delivery. The settlement of the invoices by the Defendants, then, became evidence of the dangers of the incestuous business environment that had emerged in which the Defendants had no independent method to verify the input supplied by the Plaintiff rather than an approval or ratification of the billing practice adopted by the Plaintiff.

36. Elaborate evidence was led by Ms. Olivia Lemenya (and was in convergence with the evidence of Mr. Njagi) that the process of payment of the invoices generated by the Plaintiff crucially depended on matching delivery details from the system co-created by the two parties which began with the Defendants' agents receiving an order from a distributor and generating a dashboard which would then be populated by the Plaintiff on the availability of appropriate truck for delivery in its fleet. All the other details on delivery to the distributors would match and align – but the rate of payment would crucially depend on this single source of data: whether 400 barrels orders were being artificially split into two and then in reality loaded into the same fourty-foot truck. It was the Plaintiff's agents who were the source of that data which,

then, led to a self-referencing feedback loop in in which the other details of delivery to distributors would match hence triggering payments to the Plaintiff.

37. In the circumstances of this case, it would be problematic in the extreme, as a matter of law, to deduce that payment of the invoices by the Defendants was, somewhat, evidence that the Defendants had approved the billing practices of the Plaintiff or that those practices conveyed an express or implied agreement by the parties to proceed on that basis. Neither can there be any permissible deduction that the Defendants ratified the practices. There was no knowing approval or even toleration of the practices and action was taken as soon as it was discovered. For the same reasons, even if equitable estoppel could have been of use to the Plaintiff, it does not arise here: there can be no equitable estoppel where the party seeking to rely on it acted inequitably in the first place.

38. I am further fortified in this view by the fact that the Defendants took action immediately it became apparent that something was amiss in the billing practices. Apart from the internal audit initiated which brought to life the issues the Defendants noticed about the invoice-splitting, as the testimony of Ms. Olivia Lemenya discloses, the Defendants embarked on a thorough-going process to reform their processes to address the gaps that had been laid to bare in this failed relationship with the Plaintiff. One of the specific reforms initiated was to change the physical location of the team members so that FLCs doing the order creation would have physical sight of the truck being loaded to forestall the possibility of invoice-splitting.

39. Lastly, it was incumbent upon the Plaintiff to demonstrate to the Court on a balance of probabilities that the Defendants owed it Kshs. 87,765,246.36 under the contract it had with the Defendants and, further that the Defendants were in breach of the contract. To do so, the Plaintiff had to prove that the parties had either agreed expressly to splitting Defendants' Delivery Invoices or that the Defendants had acquiesced or approved this billing practice. In my view, the Plaintiff failed, on balance, to prove either claims.

40. Consequently, for all the reasons proffered above, it my finding and conclusion that the Plaintiff has failed to establish its claim to the required standard of proof. Hence, Plaintiff's claim fails in its entirety. The entire suit is hereby dismissed with costs.

41. Orders accordingly.

Dated and delivered at Kiambu this 2nd Day of August, 2018.

……………………………………

JOEL NGUGI

JUDGE