



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 520 OF 2014

AMIRAN (K) LIMITED.....PLAINTIFF

VERSUS

MISHALE FREIGHTER LIMITED.....DEFENDANT

JUDGMENT

1. *The Business of Amiran (K) Limited, the Plaintiff*, is importation of farm inputs that is Chemicals and Farmer’s Kits, which it would then supply to large, medium and small farms; supply also to green houses. In that business of importation of those inputs the Plaintiff engaged the services of *Mishale Freighters limited, the Defendant*, as a clearing and forwarding agent. It is the common position of the parties that they had this business relationship for 7 years but that their relationship was not governed by a written contract.

2. It is the Plaintiff’s case that on ordering various farm supplies from abroad the Plaintiff would give the Defendant money to clear those supplies at the Mombasa port. The Defendant would subsequently raise its *Fee Note* which would be settled by the Plaintiff.

3. It is also the Plaintiff’s case that it ordered for goods from China and Israel on diverse dates and documents for clearing those goods were collected by the Defendant by **October 2014**. The Defendant’s Managing Director, Leonard Kali, confirmed in evidence that those clearing documents were collected by his employee called Paul. The documents collected by Paul, as tabulated in the Amended Plaintiff, are as follows;

Order File No.	Date	Quantity of Containers
3323-4D0186	24/10/2014	3X20’ (Twenty foot containers)
140133/1	24/10/2014	3x20’
140097	22/10/2014	3x20’
140097	22/10/2014	1x20’
140053/3	22/10/2014	6x20’
450209	23/10/2014	1x40
4D0168/1	08/10/2014	1x20’
140085	23/09/2014	3x20’
140036	23/09/2014	5x20’

4. The Defendant calculated the taxes due and presented to the Plaintiff proforma invoices for the total amount of **Kshs 14,158,428/-**. The Plaintiff’s witness, *John Otieno*, stated that the Defendant was given the amount of **Kshs 14,679,017/-**. The Plaintiff’s witness in his testimony specified the various cheques paid to Defendant amounting to the amount claimed in the Amended plaintiff.

5. The Plaintiff's claim is that the Defendant, despite being paid the amount to clear the container from Mombasa Port stated above, failed to clear them and the Plaintiff, with the assistance of the police, regain possession of the clearing documents, from the Defendant, but to date has failed to obtain the refund of the money paid to the Defendant.

6. The Defendant, through the evidence of Leonard Kali, stated that it entered into an **agency agreement** with the Plaintiff which is evidenced by a letter dated **18th May 2007**. That the Defendant rendered services of clearing goods at the Mombasa port, for the Plaintiff, diligently and honestly for 7 years until **September 2014**.

7. The Defendant's witness stated that the Plaintiff unilaterally changed the rates of charges it would pay the Defendant for clearing its goods. That when that change was made the defendant had already received the documents in relation to the clearance of the 26 containers, which are the subject of this suit. The Defendant's managing director requested for a meeting with the Plaintiff's representative, to discuss the change of charging rates. That in **November 2014** while the Defendant waited for the issue of change of rates to be resolved, the Plaintiff made a complaint to the Embakasi police station. In this regard the Defendant denied that it became evasive or that it refused to perform its duties assigned by the Plaintiff.

8. The Defendant in evidence stated that it lost business as result of the Plaintiff's report of the Defendant to Kenya Revenue Authority which it stated was actuated by malice and spite. It should however be stated that the evidence of spite and malice or any damage allegedly suffered by Defendant is not before Court because the Defendant's proposed amended defence was disallowed by the Court's Ruling of **27th March 2017**.

ANALYSIS AND DETERMINATION

9. The issues that present themselves for determination are only two. They are;

a) Does the Defendant owe the Plaintiff Kshs 14,158,428.00;

b) Who shall pay the costs of the suit.

10. The Defendant was engaged by the Plaintiff from time to time to clear goods for the Plaintiff at the port of Mombasa. It is accepted by the parties that that agreement involved the Plaintiff handing over clearing documents to the Plaintiff. The Defendant would then calculate the taxes and other charges payable for the clearance of the goods which the plaintiff would pay. After the goods were cleared the Defendant would raise an invoice of its charges and which the Plaintiff's witness said would be paid by the Plaintiff. Indeed there is no evidence before Court that the Plaintiff failed to pay any of the Defendant's invoices.

11. The evidence of the Defendant's witness that the Plaintiff's and Defendant's relationship was governed by an agreement is not supported by any documentary evidence. What is before Court is the Plaintiff's circular, undated, addressed to "**All Clearing Agents**" and entitled "**C & F rates 2014**". That is a document, it would seem, addressed to all clearing agents who offered services to the Plaintiff. That can hardly be defined as an agreement.

12. It follows that there is no evidence before Court that the Plaintiff is indebted to the defendant. There is however evidence that the Defendant's agent called Paul collected clearing documents from the Plaintiff for clearance of its containers. There is also evidence that the Plaintiff paid cheques totalling **Kshs 14,158,428/-** for the clearance of those containers, to the Defendant. Even though the burden of proof shifted to the defendant, it failed to prove it had a claim against the plaintiff and failed to prove it refunded the amount paid to it by the Plaintiff.

13. Evidence adduced, and not denied by the Defendant, was that it received the stated amount from the Plaintiff to clear goods for the Plaintiff. It failed to clear those goods. The Plaintiff had to take back the clearing document and organised for another agent to clear them. The Defendant therefore is proved to be indebted to the Plaintiff for the amount claimed. The Plaintiff proved its case on required standard of proof, on balance of probability.

14. The Plaintiff having proved its case against the Defendant it follows that it is entitled to have the costs of the suit. Costs must in this case follow the event.

15. In the end judgement is hereby passed in favour of the Plaintiff against the Defendant for:-

a) Kshs 14,158,428.00

b) Costs of the suit.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 29th day of November, 2018.

MARY KASANGO

JUDGE

Judgment read and delivered in open court in the presence of:

Court Assistant.....Sophie

..... for the Plaintiff

..... for the Defendant

MARY KASANGO

JUDGE