



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & TAX DIVISION
CIVIL CASE NO. 58 OF 2008

TOTAL KENYA LIMITED.....PLAINTIFF

VERSUS

NEW KENYA CO-OPERATIVE CREAMERIES.....DEFENDANT

JUDGEMENT

1. The Plaintiff commenced this suit vide a Plaint dated 8th February 2008, and filed on the 11th February 2008. The Summons to Enter Appearance dated 12th February 2008 were served on the Defendant and the Defendant entered Appearance through the firm of J. M. Njenga & Co. Advocates on 3rd March 2008. Subsequently, the Defendant filed its statement of Defence on 19th March 2008. On the 26th March 2008, the Plaintiff filed a Reply to the Defence.
2. The brief facts of the case are that, by an Agreement dated 11th August 2003, the Defendant requested the Plaintiff and the Plaintiff agreed to issue the Defendant with fuel cards namely, Bon Voyage Cards. The cards were on the basis and for the purpose of enabling the Defendant acquire petroleum products and services on credit from the Plaintiff's outlets or from other points of sale approved by the Plaintiff without making immediate payment for such products and services.
3. That the Agreement provided *inter alia* that;
 - a. *The Plaintiff would from time to time provide the Defendant with the fuel cards as required by the Defendant.*
 - b. *That the Defendant would assign to each fuel card a confidential PIN code which would permit the use of the fuel card exclusively by the bearer at the point of sale.*
 - c. *That the Defendant or it's representatives would present the fuel card at the point of sale on the basis of which products and services would be obtained on credit.*
 - d. *That the confidential PIN code entered by the bearer at the time of each transaction shall serve as a signature testifying to the Defendant's acceptance of the transaction.*
 - e. *That the Plaintiff was to send the Defendant a monthly statement of account showing the balance currently due for payment by the Defendant.*
 - f. *That the Defendant would pay for the products and services in accordance with the statement of*

account within 30 days from the date of statement of account.

g. That any complaints or dispute concerning the amount or any injunction summarized in the statement would be processed within 30 days from the date of the statement.

4. That, between the period of August and October 2006 the Defendant made use of the Bon Voyage fuel cars supplied by the Plaintiff to acquire products and services in the sum of kshs.10,679,214/89. However, in breach of the Agreement, the Defendant has failed to pay for the same. The Plaintiff therefore prays for the said sum of Kshs.10,679,214.89, interest thereon from 1st November 2006 until payment in full and the costs of the suit.

5. The Defendant denied the claim, arguing that, the alleged Agreement entered into by the Parties, and the tabulated terms thereof, are null and void *ab initio* for non-execution by the Parties. The Defendant argued that, if any Contract existed between the Parties which is denied, it made formal complaints regarding fraudulent use of the Bon Voyage cards to the Plaintiff, who in turn undertook to conduct investigation and take the necessary corrective action. The Plaintiff did not conduct any investigations as per its customer complaints procedure.

6. The Defendant stated that, it was an express term and condition of the card that no cash would be obtained on the card in lieu of fuel products but contrary to the said provision, the Plaintiff is guilty of breach of the same and is stopped from claiming any money from the Defendant as most of the Plaintiffs claim herein consists of cash issued in lieu of fuel products. That, several meeting held between the Parties did not resolve the dispute. Further the Plaintiff is stopped from relying on the thirty (30) days period within which to demand payment. The Defendant has paid the Plaintiff a sum of Kshs.4,015,307 in full and final settlement of the Plaintiff's claim and therefore the Defendant is a stranger to the Plaintiff's present claim.

7. At the hearing of the case, the Plaintiff called a witness Lynettee Anyango Owino, it's Territory Manager, who testified to the effect that at all the material times of this suit; she was an Account Executive handling Card Business and in-charge of the Account of the Defendant. She reiterated the pleadings in the Plaint, that at no time did the Defendant raise any query about the use of the cards within the contract period.

8. The Plaintiff called as a witness Ann Minyu, a Credit Control Officer in-charge of the Defendant's Account. She testified that, at all material time, the Plaintiff provided the Defendant with monthly invoices for analysis prior to making payments. Any complaint thereof was to be raised within thirty (30) days of the issue of the bills. The Defendant never lodged any complaint against the Plaintiffs invoices within the Contract period.

9. The Defendant on their part called Peter Ombati, the Company Secretary who testified in support of the it's case. He reiterated the contents of the statement of Defence, and averred that, if the Plaintiff has any claim against the Defendant, then it arises out of fraudulent use of the cards, and in particular, due to situations where the Plaintiff supplied Petroleum products to vehicles which were not on the road, but at the Defendants workshop, and the Plaintiff giving out cash in lieu of fuel products, which is contrary to the Agreement between the Parties and for which the Defendant cannot be held liable for. As the fraudulent use of the cards was due to lack of stringent controls from the Plaintiff's Company, the Plaintiff should bear any loss occasioned to it. That, the Defendant took the initiative to alert the Plaintiff of this fraudulent use of the cards, and the Plaintiff promised to conduct investigations thereto, unfortunately that has not been done. The Defendant carried out its investigation and supplied the Plaintiff with a report. The witness insisted that, the Complaint to the Plaintiff was made in time, and acknowledged.

10. At the close of the hearing of the case, the Parties filed written submissions. The Plaintiff identified the following issues for determination:

i. Whether there was an Agreement dated 11th August, 2003 between the Plaintiff and the

Defendant on the basis of which the Plaintiff issued the Defendant with the Bon Voyage Cards.

ii. Whether the Defendant used the Bon Voyage Cards to obtain products and services to the sum of Kshs.10,679,214.89 for the months of August, September and October 2006.

iii. Whether the Defendant made formal complaints to the Plaintiff on the subject of the alleged fraudulent use of the Bon Voyage Cards according to the terms and conditions of the Agreement concerning the utilization of the Cards and if so whether the complaints were made within the stipulated time.

iv. Whether cash was obtained on the cards in lieu of fuel products contrary to the terms and conditions of the Agreement and if so whether the Defendant is liable.

v. Whether cash was obtained on the cards in lieu of fuel products contrary to the terms and conditions of the Agreement and if so whether the Defendant is liable.

vi. Whether the Defendant is liable for the acts and omissions of its employees.

vii. Whether the Defendant is liable to the Plaintiff for the sum of Kshs.10,679,214.89.

11. The Defendant identified the following issues for determination:

i. Whether the parties entered into an agreement on or about the 11th of August 2003 on the basis of which the Plaintiff issued the Defendant with fuel cards.

ii. Whether the agreement is null and void for non-execution by the parties.

iii. What were the terms and conditions of the agreement regarding the use of the cards.

iv. Whether the Defendant used fuel cards to acquire products and services in the sum of Kshs.10,676, 214.89 between August 2006 and October 2006.

v. Whether the Defendant is liable to the Plaintiff for Kshs.10,679,214.89.

vi. Whether the Defendant made formal complaints to the Plaintiff regarding the alleged fraudulent use of the fuel cards and when such complaints were made and whether such complaints were made in accordance with the terms of the agreement.

vii. Whether cash was obtained on the cards in lieu of fuel products contrary to the terms and conditions of the agreement and if so whether the Defendant is liable for the same.

viii. Whether the Plaintiff is estopped from claiming from the Defendant or from relying on the 30 days period within which to express dissatisfaction with the bills.

ix. Whether the amount of Kshs.4,015,307.00 paid by the Defendant to the Plaintiff in February 2007 was in full and final settlement of the Plaintiff's claim.

x. Whether the Plaintiff is entitled to the relief sought in the Plaintiff.

xi. What orders should be made as to costs.

12. I shall condense the issues for consideration as follows:

i. Whether the Parties entered into a valid Agreement dated 11th August 2003 and what were the terms thereof. Whether that Agreement is the basis upon which the Plaintiff has brought this claim.

ii. Whether the Defendant used the Bon Voyage Cards to obtain products and services to the sum of Kshs.10,679,214.89 for the months of August, September and October 2006.

iii. Whether, the card was used in a fraudulent manner, including the issuance of cash in lieu of fuel and other products. If so, who is liable for the same.

iv. Whether the Defendant is liable to pay the Plaintiff a sum of Kshs.10,679,214.89 sought.

v. Whether the amount of Kshs.4,015,307.00 by the Defendant was in full and final settlement of the Plaintiff's claim.

vi. Who is liable to pay costs of the suit.

13. I shall first deal with the issue of the Agreement dated 11th August 2003. The Defendant has faulted the agreement, describing it as null and void for non-execution by the Parties. The Defendant submitted that, first and foremost, the Agreement is **not dated 11th August 2003 but 31st July 2002**, as such there is no agreement dated 11th August 2003. That refers to **Kenya Co-operative Creameries (2002) Ltd** and **not the Defendant** herein; New Kenya Co-operative Creameries. Being two distinct companies, the Defendant is not in any way affected by the contract referred to herein.

14. The Defendant further submitted that, the contract **was not signed by the Parties**, and therefore it is null and void *ab initio* and should not be relied upon by the Parties. Reference was made to the case of **George Ngatiri t/a Naivasha Millers 1987 Vs Naphtali J. M. Mureithi & Another 2005 eKLR.**

15. In response to the issues raised above, the Plaintiff submitted that, the Agreement dated 11th August 2003, **is signed by the Parties**. The Defendant signed through it's General Manager, and vice Chairman on the Total Bon Voyage Card Corporate Application Form and Contract Agreement on 29th January 2002 and 31st July 2002 respectively and later affixed it's Company Rubber Stamp. The Plaintiff submitted that the aforesaid Agreement bound the Parties into a legal relationship and the Defendant is bound by the terms thereof. Reliance was placed on the case of **Husamuddin Gulamhussein Pothiwalla Administrator, Trustee and Executor of the Estate of Gulamhussein Ebrahim Pothiwalla Vs Kidogo Basi Housing Corporative Society Limited and 31 Others Civil Appeal No.330 of 2003** quoted with approval the holding of the Court in **National Bank of Kenya Ltd Vs Pipeplastic Samkolit & Another [2001] KLR 112** at page 118 where the Court stated as follows:

"A Court of law cannot re-write a Contract between the Parties. The Parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge. As was stated by Shah, JA in the case of Fina Bank Limited Vs Spares & Industries Limited (Civil Appeal No. 51 of 2000) (unreported):

"It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a Party from a bad bargain; it is ordinarily no part of equity's function to allow a Party to escape from a bad bargain".

16. The Plaintiff further submitted that, the Defendants' witness, testified that it was aware, that there indeed existed a relationship between the Plaintiff and the Defendant. In addition, the Defendant signed the Application Form for the Fuel charge cards and took possession of the same, and that shows they were willing to be bound by the Agreement.

17. I have considered the rival submission on the Agreement dated 11th August 2003. I have had the benefit of looking at the Plaintiff's bundle of documents and I note that annexed thereto from pages 1- 5, is a document titled "***Total Bon Voyage Corporate Application Form and Contract Agreement***", Company Account No. 4112794. The Company therein is described as **Kenya Co-operative Creameries (2000) Ltd**. The document is signed by Godfrey Njuguna Njenga, Vice Chairman and by Paul Odhiambo

on behalf of the Company, Kenya Co-operative Creameries. The document was executed on 31st July 2002 and 29th July 2002 respectively. Therefore there is no contract dated 11th August 2003 which is referred to herein by the Plaintiff in their pleadings. The Defendants are therefore right in their submissions that, there is no such contract in existence. Why the Plaintiff made a reference to such a non-existent contract is not clear to the Court. In the same vein, if that contract does not exist, then the Defendant cannot argue the non-execution thereof and the subsequent reference to it is null and void *ab initio*. Therefore the Parties can only be bound by the terms of the document they signed referred to as **“TOTAL BON VOYAGE CORPORATE APPLICATION FORM AND CONTRACT AGREEMENT”**.

18. However, I find that the Parties have through their respective pleadings conceded that, there was a business relationship between them. The Defendant’s witness testified that;

“I am aware that, there existed a business relationship between the Parties herein specifically regarding the Bon Voyage Fuel Card”.

19. I therefore find that, although the alleged contract dated 11th August 2003, does not exist, the Parties had a business relationship whereby the Plaintiff supplied the Defendant with Bon Voyage Cards for use to obtain petroleum products and services, and the Defendant accepted the cards for use and in deed used them. There was indeed a contractual relationship of supply of goods/products and services.

20. That leads me to the next question; whether the Defendants used the cards, and incurred the sum sought herein. The Defendant submitted that, the onus of proving that the Defendant indeed consumed the fuel worth Kshs.10,679,214. 89 lies on the Plaintiff. The Defendant further submitted that, the Plaintiff has not produced the **“receipts”** generated at the point of sale, showing the transaction details; and questioned why the Plaintiff opted to produce statement of Defendant’s Account, which can be generated or made up by any human intervention to prove a claim. The Defendant argued that, the Plaintiff has failed to address the **“Complaint”** of fraudulent use of the fuel cards reported to them, acknowledge receipt thereof, and request the to block certain vehicles from getting fuel products. Yet, thereafter the complaint, the Plaintiff allegedly continued fueling those motor vehicles even after they were blocked and the loss incurred after request to block cards cannot be visited upon the Defendants. That, the Plaintiff having failed to conduct their own investigations cannot blame the Defendant as fraud cannot be committed by one party, both parties must have been involved in one way.

21. The Plaintiff however submitted that, it is only the representatives of the Defendant who hold the confidential PIN, and who could have used the cards to obtain the products and the services as stated in the invoices for the months of August, September and October. The Defendants were issued with periodic bills on a monthly basis and did not report any anomalies prior to August 2006, nor communicate to the Plaintiff that there were motor vehicles being fueled while under repair at their garage so that the Plaintiff could black list the cards. That, the Defendants only requested for blockage of the cards used with respect to 14 vehicles out of time vide a letter dated 22nd September 2006. In addition, the evidence adduced by the Defendant fails to support the allegation that card was given in lieu of products/services.

22. I have now considered the submissions by the respective parties herein in relation to the use or misuse of the fuel card, and the resultant loss. I shall consider this issue alongside the issue of who should bear the loss. I take note of the terms and conditions of the document signed by the parties herein referred to as **“Application Form and Contract Agreement”**. Article 2 of the said document relates to *“use of the card”*. The conditions thereon stipulate that the use of the BON VOYAGE CARD:

- ***Shall be limited to the Cardholder subject to the maximum amounts and Products and Services authorized and defined in the Agreement with the Client on the Card.***
- ***Shall be at the authorized Points of Sale whose list will have been availed to the Client as per Article 1 above.***
- ***Shall be limited in time (cf. validity of the contract mentioned on the reverse side of the Card).***
- ***Shall be subject to presentation of the Card(s) to the station’s personnel prior to any transaction.***

- *Any transaction effected with the Card(s) shall give rise to the editing of a ticket by the electronic terminal.*
- *The Confidential Code entered by the bearer at the time of each transaction shall serve as a signature testifying to the client's acceptance of the transaction.*
- *It is expressly stipulated that the purchase of fuel shall be exclusively limited to the immediate filling of the vehicle's tank; any removal by other means is excluded.*
- *The records edited on the electronic terminals at the time of each transaction shall constitute conclusive proof of the amount of the transaction.*
- *Shall be limited to not more than Six daily transactions per Card(s).*
- *It is specifically prohibited, with the consequence of summary termination of this contract, to re-sell or return for cash refund the products or services obtained with the Card(s). (Emphasis mine).*

23. It is therefore clear to the Court that, for liability to pay for products the Defendant to pay, the Plaintiff must prove *inter alia*, that the “**products**” and/or services were rendered. The Plaintiff must produce evidence of the “editing a ticket by the electronic terminal”. In fact, Article 2 clearly states that, “the records edited on the electronic terminals at the time of each transaction, shall constitute conclusive proof of the amount of the transaction”. There must also be evidence that, the Confidential Code used was valid.

24. I have gone through the Plaintiffs bundle of documents filed in Court on 21st June 2011 and noted at pages 52 – 144 a detailed statement of accounts from 1st July 2006 to 23rd September 2008 and at page 156 of the bundle reference is made to a statement of accounts as at 29th November 2007. At pages 157 to 274 the Plaintiff attaches invoices. I have therefore not seen any “records edited on the electronic terminals”. The Defendant is correct in its submissions that, the receipts generated at the point of sale are conclusive evidence and have not been produced. It is not enough for the Plaintiff to simply allege that the Court should “see the statements in the Plaintiff's bundle of documents pages 157 – 274”. These are invoices. Invoices, are generated from the sales made/services rendered. The same are evidenced by receipts generated at the point of sale. Where are these receipts? The Plaintiff have to the contrary heavily relied on the PIN as evidence of proof that, the representatives of the Defendant actually used the cards and state:

“The quoted parts of the contract between the Plaintiff and the Defendant show that the Defendant or its Representatives hold the Bon Voyage Card and are the only people in custody of the confidential code and thus are the only persons who would have acquired the products and services outlined in the invoices for the months of August, September and October”.

25. That is correct. But, even when the correct PIN is entered into the electronic terminal, it is simply signature for approval of the authorized use. It does not show the evidence of what was sold, products, or services rendered, and the amount incurred. That can only be obtained from the electronic terminal receipts. Surprisingly, the Plaintiff remained silent on the non-availability of these receipts.

26. However, I note that the Parties relationship was based on generation of invoices, and once received by the Defendant, the Defendant would pay. I have indeed looked at the invoices produced at page 157 – 274. They clearly make reference to the Card Numbers, the Product sold, the Receipt number, the date, the Station, the Quantity and Amount. This information must have been generated from the receipts from the electronic till/machine. Even then I have taken the trouble to go through all the invoices produced. I note that, Invoice No. FA 06/106959 relate to the products sold or services rendered in the months of September 2006, with isolated spot products or services rendered in the month of August 2006. The total amount in relation to this invoice is indicated at page 208 of the Plaintiff's bundle of documents as **Kshs.6,717,815.24**.

27. I also note that Invoice No. FA 06/108201 relates to products and/or services rendered in the months of October 2006 and isolated entries of September 2006. The total sales/services cost adding up to **Kshs.1,126,141.84**, as indicated at page 223 of the Plaintiffs bundle of documents. Invoice No. FA06/106214 relates to transaction carried out in the months of August 2008 with isolated transactions of

July 2006. The same gives rise to a total of Kshs.6,818,888.04. Therefore the total amount as per these invoices is:

Invoice No.	Amount (Kshs.)
i. FA O6/106959	6,717,815.24
ii. FA O6/108201	1,126,141.84
iii. FA O6/10214	<u>6,818,888.04</u>
Total amount	<u>14,662,845.12</u>

28. The Defendant has stated herein that they made a payment of Kshs.4,015,307 in full and final payment of the claim. If that amount is deducted from Kshs.14,662,845.12, the amount remaining is Kshs.10,617,438.12. This figure is slightly different from the figure claimed herein.

29. Be it as it were, the question is this amount payable by the Defendant. Based on the pleadings and the evidence adduced, my findings on this issue is that, Both parties are to blame. The Plaintiff is to blame due to the poor internal control mechanism whereby the Defendant's agents were able to collude with the Plaintiff's employees and as alleged paid cash in lieu of fuel and other products or fueled motor-vehicles under repair at the Defendants premises or garage. On the other hand, the Defendant is to blame as it's agents misused the key that enabled them to access the services and/or products offered/supplied by the Plaintiff. This key was the PIN Number. If the fraud was committed by use of wrong PIN Number, it would not have succeeded. As rightfully submitted by the Defendants, the fraud herein was a pure scheme involving employees of both Parties. The principle of Equity "**He who goes to Equity must go with clean hands**" applies to both parties.

30. What is disappointing is the fact that, there was no formal report of the alleged fraud to the criminal investigation agencies to establish which of the Parties employees are to blame. Each Party is merely alleging the other is to blame. The Defendant submitted that, they carried out investigations and gave the report to the Plaintiff. Why the Plaintiff, why not the Director of Criminal Investigation. That report though indicated as included in the Defendant's bundle of documents, is not included. It was also alleged that a report was made to the Plaintiff over the fraud, and the Plaintiff failed to act on the same. However, I find that, apparently, the fraud herein took place, and when discovered it probably continued for sometime before it was stopped. So there was loss prior to the discovery of the fraud, and "maybe" thereafter. Be that as it may, the tools used to facilitate the same, at whatever stage, were held by the employees and/or agents of the respective parties herein. My finding on this issue, is as stated, both parties are to blame and in whether the formal complaints by the Plaintiff were made within the stipulated time of thirty (30) days.

31. The other issue raised by the Defendant relates the proper Defendant sued, whether it is New Kenya Co-operative Creameries or New Co-operative creameries Ltd, I find that is neither here or there, in view of Defendants pleadings and correspondences exchanged, and filed in Court in which they acknowledge the claim by the Plaintiff and have partially settled it.

32. In conclusion, I find that;

i. The Parties herein had a contractual relationship involving the supply of Bon Voyage Cards by the Plaintiff to the Defendant for use in obtaining fuel and other products from various outlets.

ii. The Plaintiff had to make sure the Motor vehicles fuel were physically present at the station.

iii. The Defendant had to control the use of the PIN Number.

iv. Both parties failed to install internal control system to guard against fraud. It was committed.

All these other technical defences raised, will not alter that position.

v. None of the Parties investigated or caused investigation to establish who was to blame.

33. The upshot of all these is that I apportion liability between the Parties herein in the ratio of 50% 50% in favour of the Plaintiff and as against the Defendant. As a result of which judgement is entered in the sum of **Kshs.5,308,719.50**, being 50% of **Kshs.10,617,438.12**, established from the documents filed herein. This amount awarded shall attract interest at Court rate from the date of this Judgement until payment in full. In view of the fact that, liability has been equally apportioned, each party shall bear it's own costs.

34. Those then are the orders of the Court.

Orders accordingly.

Dated, delivered and signed on this 30th day of June 2017 at Nairobi.

G. L. NZIOKA

JUDGE

In open court in the presence of:

Ms. Ouma for Mr. Muchemi for the Plaintiff

Mr. Kabere for Ms. Wachanga for the Defendant

Teresia – Court Assistant