



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 501 OF 2006

SHIVAM ENTERPRISES LIMITED PLAINTIFF

VERSUS

VIJAYKUMAR TULSIDAS PATEL T/A HYTECH INVESTMENTS.....DEFENDANT

J U D G M E N T

1. This is a suit brought by Shivam Enterprises Ltd. against Vijaykumar Tulsidas Patel trading as Hytech Investments Ltd. It was issued in September 2006. The Plaintiff's Advocates filed a Notice of Appointment on 12th September 2006. The Defendant Advocates filed their Notice of Appointment on 29th September 2006.
2. The matter appears to have had a long and involved history, including on 7th September the Plaintiff applied for a warrant of arrest against the Defendant to show cause why he should not furnish security for the sum of Kshs. 24,235,207.75. That Application was not successful.
3. By its Amended Plaint the Plaintiff is seeking payment of an alleged debt in the sum of Kshs. 24,895,840.40 together with interest at commercial rates.
4. The Plaintiff avers that payment has been demanded and notice of intention to sue has been given but no payment was forthcoming.
5. The Parties, through the Plaintiff's Director Pravin S. Patel and the Defendant Vijay Kumar Tulsidas Patel made various allegations and counter allegations against each other. For example on behalf of the Plaintiff it is said that the Defendant has vowed never to pay the debt and to remove his assets from the jurisdiction (Affidavit of Pravin S. Shah dated 7th September 2006). The Defendant counters that the Plaintiff has not provided the court with a true and correct statement of account and that the Statement of Account at page p1 of the Annexure to the Affidavit of Pravin S. Shah dated 19th September 2006 does not reflect the position of his dealings with the Plaintiff. He goes on to say that "the correct statement of account reflecting the dealings [he] had with the Plaintiff are stored in one of the computers kept specifically for that purpose in its head office in Industrial Area which Pravin Patel of the Plaintiff has vowed he will never produce or disclose to [the Court]". He also says by August 2006 the debt was 8,178,463.10.
6. As to the identity of the Defendant, the Plaintiff's case is that Mr. Patel was a sole trade at the material times.

7. The background to the dispute is much more mundane. The Plaintiff was a manufacturer and supplier of specialised paints and related goods. The Plaintiff supplied various goods to the Defendant at the Defendant's request. The Defendant was therefore a customer. That is admitted in the Defence. This relationship continued from 2006 – 2008.

8. The Defendant denies that the sum of Kshs. 24,895,840.40 was outstanding by August 2006. The Defendant avers that at the end of August 2006, the amount due and owing to the Plaintiff was on Kshs. 8,178,463.10. The Defendant also avers that he sold his motor vehicle Reg. No. KAM 529E to the Plaintiff at the agreed price of Kshs. 420,000/= which amount has not been paid by the Plaintiff. Surprisingly, in contrast to paragraphs 8 of the Defence, paragraph 11 of the Defence states that:-

“The Defendant denies having been issued with a demand and notice of intention to sue as alleged in paragraph 6 and avers that he is only indebted to the Plaintiff in the sum of Kshs. 2,253,603.10 as pleaded in paragraph ...”.

The Defendant states at paragraph 9 that he was willing to pay. Payment was not, however made until Judgment on admissions was obtained and enforced.

9. In its Supporting Affidavit dated 1st December 2006 the Plaintiff (through its Managing Director) says that as a consequence of the supply of goods to the Defendant the debt of Kshs. 24,895,850.40 is outstanding. It is also said the Defendant refuses to pay and has issued cheques which have been returned unpaid. The Defendant counters by stating that the Plaintiff never presented the cheques for payment. The Defendant did not file a witness statement and relies on his affidavit in the bundle.

10. On 19th January 2007 there was an Application (by the Plaintiff) for Summary Judgment. I assume it was not successful as the matter came before me for hearing on 26th January 2015.

11. Briefly, the Plaintiff's case is that it supplied the Defendant with certain of the products it manufactured together with specialist paints. The supplies were made between April 2006 and August 2009. The Plaintiff in its evidence seeks to show that the deliveries were made and accepted, but payment was not made in full. The Plaintiff concedes that it purchased paints and a car from the Defendant and the costs of these were offset against the outstanding debt save that he paid cash for the car.

12. I heard oral evidence from Pravin S. Patel, the Managing Director of the Plaintiff and was taken to the Plaintiff's documents filed on 22nd April 2013. The Defendant also filed its list of documents 23rd May 2013 and his Affidavit.

13. The Defendant denies a substantial part of the debt. However, the part that is admitted i.e. Kshs. 2,253,603.10 has been paid according to counsel for the Plaintiff, a further Kshs. 5,000,000/= has been discounted which leaves a figure of roughly Kshs. 17,000,000/= broken down as follows:

24,895,840

Less 2,253,603.10

Less 5,504,860

Kshs. 17,137,376.90

14. The evidence of the Plaintiff's only witness was that it supplied paints, thinners and associated products to the Defendant. The Defendant would place an order usually by telephone and the goods were delivered to the Defendant's shop called Hytech Investments, situated in Gikomba. The Defendant would then sign the delivery note. An Invoice was then raised. Copies of various delivery notes are produced in the Plaintiff's Documents at page 7 of the Plaintiff's Bundle of Documents there is the Delivery Note

dated 25th August 2006 (2160). It records the order. That is then signed by the Defendant and the business seal affixed. Page 6 is the corresponding Invoice of the same date. Likewise Delivery Note 2159 corresponds to Invoice No. 2159 (pages 8 and 10) of the Bundle.

15. The Plaintiff's Bundle contains all the Delivery Notes and correlating Invoices setting out amounts due and payable. A sample appears below:

Invoice No. 2160 dated 25/8/06 for Kshs. 102,975.70

Invoice No. 2159 dated 25/8/06 for Kshs. 365,410.75

Invoice No. 2154 dated 23.8.06 for Kshs. 169,801.00

Invoice No. 2153 dated 23.8.06 for Kshs. 93,001.40

Invoice No. 2152 dated 22.8.06 for Kshs. 250,041.15

Invoice No. 2142 dated 21.8.06 for Kshs. 349,971.00

Invoice No. 2141 dated 19.8.06 for Kshs. 8,000.00

Invoice No. 2140 dated 19.8.06 for Kshs. 281,531.70

Invoice No. 2135 dated 18.8.06 for Kshs. 17,000.00

Invoice No. 2134 dated 18.8.06 for Kshs. 125,250.00

Invoice No. 2133 dated 18.8.06 for Kshs. 136,741.00

Invoice No. 2127 dated 16.8.06 for Kshs. 13,931.300

Invoice No. 2126 dated 16.8.08 for Kshs. 208,931.30

Invoice No. 2122 dated 15.8.08 for Kshs. 289,801.16

Invoice No. 2121 dated 14.8.08 for Kshs. 118,800.00

Invoice No. 2116 dated 12.8.08 for Kshs. 12,900.00

Invoice No. 2117 dated 12.8.08 for Kshs. 328,553.80

Invoice No. 2115 dated 11.8.08 for Kshs. 29,099.95

Invoice No. 2111 dated 11.8.08 for Kshs. 44,00.00

Invoice No. 2110 dated 11.8.08 for Kshs. 152,090.50

Invoice No. 2109 dated 9.8.08 for Kshs. 213,915.50

Invoice No. 2105 dated 9.8.08 for Kshs. 11,172.80

Invoice No. 2103 dated 9.8.08 for Kshs. 5,403.50

Invoice No. 2101 dated 9.8.08 for Kshs. 38,160.60

Invoice No. 2100 dated 8.8.08 for Kshs. 62, 615.25

Invoice No. 2099 dated 8.8.08 for Kshs. 21,250.00

Invoice No. 2098 dated 8.8.08 for Kshs. 197,750.00

Invoice No. 2093 dated 7.8.08 for Kshs. 121,231.15

Invoice No. 2092 dated 7.8.08 for Kshs. 159,250.50

Invoice No. 2090 dated 5.8.08 for Kshs. 184,300.80

Invoice no. 2089 dated 5.8.08 for Kshs. 124,000.00

Invoice No. 2085 dated 1.8.08 for Kshs. 16,000,00

16. Each Invoice has a corresponding Delivery Note carrying the same number. Each Delivery Note is signed and stamped to acknowledge receipt of the goods "in Good Condition" except for Invoice No. 2098 which is only signed by an Oscar.

17. The Plaintiff also provides copies of receipts dated from 2 March till 25th August 2006. At page 556 the Plaintiff produces a partial copy of an Agreement of Sale whereby Mr. Vijaykumar Tulsidas Patel (the Defendant) sold his car to the Plaintiff company for a sum of Kshs. 420,000/=. The accompanying Petty Cash Voucher is signed by the Defendant acknowledging payment. It should be noted that at paragraph 11 his Affidavit (dated 25th September 2006) the Defendant denies receiving any payment for that sale.

18. The Plaintiff has also exhibited the cheques he received from the Defendant between 22 March 2006 and 30 July 2006. They are:

- 1) Cheque No. 106 dated 22.3.06 for Kshs. 1,000,000
- 2) Cheque No. 119 dated 30.4.06 for Kshs. 480,000
- 3) Cheque No. 118 dated 22.4.06 for Kshs. 435,000
- 4) Cheque No. 120 dated 2.5.06 for Kshs. 400,000
- 5) Cheque No. 117 dated 15.4.06 for Kshs. 260,000
- 6) Cheque No. 153 dated 4.5.06 for Kshs. 1,500,000
- 7) Cheque No. 151 dated 4.5.06 for Kshs. 1,500,000
- 8) Cheque No. 152 dated 4.5.06 for Kshs. 1,500,000
- 9) Cheque No. 132088 dated 26.8.06 for Kshs. 26,280.40
- 10) Cheque No. 132063 dated 16.8.08 for Kshs. 11,500,000
- 11) Cheque No. 132061 dated 16.8.06 for Kshs. 7,075,000
- 12) Cheque No. 132069 dated 29.7.06 for Kshs. 240,121.40
- 13) Cheque No. 128770 dated 30.7.06 for Kshs. 384,819.55

The last cheque appears to have been presented on 29 July 2006 notwithstanding the date on the face of the cheque.

19. The amounts on the cheques came to a total of Kshs. 15,049,242.95. It is the Plaintiff's case that these cheques were not honoured and therefore were not paid. The Defendant states (again in his Affidavit) that the cheques were not presented. In his oral evidence the Plaintiff's Witness accepts that evidence to a limited extent. He says that after the first one or two cheques were returned unpaid, the Plaintiff's bank – which was also, then the Defendant's bank, advised them not to present further cheques as there were no funds available. This was to prevent the Plaintiff from incurring unnecessary charges.

20. In his witness statement, Mr. Pravin Patel says that the Parties had a trading relationship from July 2005, when the Defendant first set up in business. The Plaintiff provided the Defendant with goods and supplies on credit and subsequently the Defendant would pay varying amounts. That meant payment was not regular or consistent. The business relationship was on good terms and goods were supplied on credit but a record was kept of supplies. The two parties had premises in the same area (Gikomba). Goods were ordered by phone and hand delivered. The Delivery Note was signed to signify receipt in good condition. The Plaintiff says the Defendant did not challenge any of the Invoices raised at the time. It is noteworthy that the various defences raised by the Defendant whether in his pleading or his various affidavits, he does not challenge either the Delivery Notes nor the individual Invoices except to say that they are all a false record and that a true record exists elsewhere specific items are not challenged.

21. Following concerns about repayment, the Plaintiff wrote to the Defendant seeking confirmation of the debt as it stood at 5th August 2006. The Defendant countersigned the Letter of Confirmation signifying its veracity. The balance then stood at Kshs. 24,233,297.75. The Defendant issued various cheques amounting to Kshs. 19,940,129.90 all of which were dishonoured. Nevertheless the Plaintiff provided the Defendant with further goods during August 2006. The Plaintiff also states that the issue of the Kshs. 5,504,860.40 arises from cross trading between the Parties. In oral examination, Mr. Patel stated that the Plaintiff sourced specialist paints from the Defendant.

22. Unfortunately a copy of the letter of 5th August 2006 does not appear in the Plaintiffs bound Bundle of Documents. There is a copy in the Defendant's Bundle. However, the Plaintiff provided the original to the court and explained how it was with the Plaintiff.

23. This suit was certified as ready for hearing by Hon. Mr. Justice Havelock as long ago as 16th December 2013. It was then listed for Hearing on 20th May 2014 when neither the Defendant nor his representatives attended the hearing. Due to lack of court time the matter was taken out of the list. It was re-listed before me on 3rd November 2014 by which time Havelock J had retired. On that date Mrs. Ligunya was not able to proceed as counsel with conduct had taken up a new appointment with the DPP. An adjournment of three weeks was requested and granted. Both Parties' Advocates were in Court and both agreed to the hearing being listed for Monday 25th January 2015. The hearing was given for 11 a.m. Yet again, neither the Defendant nor his Advocate attended. As this is an old matter and it has been fixed previously and this time by consent, I took the view that justice delayed is justice denied and proceeded with the hearing.

24. The Balance of Confirmation dated 5th August 2006 appears in the Defendant's List and Bundle as "9 Blank Confirmation Letter". The Plaintiff produced the original documents in Court. That document was signed by the Defendant Vijaykumar Tulsidas Patel. The Plaintiff's witness was examined on the differences between the document produced in the bundle and the original now produced in Court. He said that it was signed by him and filed after the Defendant had confirmed the amount by signing and returning the document. The Defendant even signified his agreement by deleting the words "do not agree" and inserted the amount. If he did not agree the sum, why would he do so?

25. In his Supplemental Affidavit (dated 11th December 2006) the Defendant states at paragraph 14 that he signed the Confirmation of Balance not indicating that there was a balance of "Kshs. 24,233,297.75, but because the Plaintiff was "misrepresenting to me that he was to use the same to enable the bank to obtain a bank loan". The Defendant admits he gave the Plaintiff cheques but says they were not in payment of the alleged debt but at the request of the Plaintiff. It is also said the Bank of Baroda Cheques were given to the Plaintiff's director to enable him to obtain a loan. In relation to the cheques, the

Defendants Documents include Bank Statements for the Defendant/Hytech which show that save for a few occasions immediately after deposits were made the Defendant's account with Charterhouse Bank was overdrawn throughout May 2006. The Defendant says he made cash payments (paragraph 14, Supplemental Affidavit). The Plaintiff has produced copies of the cash book.

26. Since the proceedings commenced there have been several application. On 5th July 2008 Kihara J. entered Judgment on admissions in relation to the sum of Kshs. 2,253,603.10 together with interest and costs. That was paid. The sum of Kshs. 5,504,860 is also deducted to account for supplies made to the Plaintiff.

27. On 22nd July 2008 the Defendant set up a Limited Company called Hytech Investments Ltd. It is clear from the certificate of Incorporation that this company was created after the proceedings were commenced and therefore could not have been the entity with which the Plaintiff was trading.

28. In relation to the car, the witness confirmed in oral evidence that he paid for the car in the sum of Kshs. 420,000 and took the court to the Agreement of Sale and Confirmation of Payment. Although the Defendant appears to be denying that he received payment for the car, his list of documents includes at Item No. 4 an "Agreement for Sale with respect to vehicle Registration No. KAM 529E together with Payment Voucher". It is surprising for the Defendant to have a **payment** voucher – signed by him as recipient, if he had not received payment.

Decision and Order:

29. In the circumstances, I have no hesitation in accepting the evidence on behalf of the Plaintiff. The witness was clear and consistent and keen to assist the court clarify discrepancies. On the whole his evidence was corroborated by the documents and therefore is credible.

30. I am satisfied that the documents produced by the Plaintiff were a true and contemporaneous record of dealings between the Parties. I note the Defendant has selectively reproduced the same documents. I find that on a balance of probabilities the goods described were delivered to and accepted by the Defendant.

31. I disbelieve the evidence contained in the Defendant's Affidavit and in particular the following:

- a. That the Plaintiff has a different record which is the true record of dealings.
- b. That the Plaintiff did not pay for the Motor Vehicle Registration No. KAM 529E.
- c. That the cheques and Confirmation of Balance were given to the Plaintiff with the intention that they should be used to mislead the Bank. This amounts to an admission by the Defendant that he would be willing create a false document and therefore impacts on the weight of his evidence.
- d. That the entity trading with the Plaintiff was a Limited Company.

32. Therefore and for the reasons given above, I find that the Defendant is indebted to the Plaintiff in sum of about Kshs. 17,132,376.90 together with interest.

ORDER:

1. The Defendant shall pay to the Plaintiff the sum of Kshs. 17,137,376.90 or such other sums found due by the Deputy Registrar.
2. The Defendant to pay Interest at a rate of 14% p.a. on the sums found due from the date incurred to the date of payment.
3. Parties to attend before the Deputy Registrar within 28 days to ascertain the exact sums due.
4. The Defendant shall make payment within 28 days of ascertainment of the amounts due.
5. The Defendant to pay the Plaintiff's costs.

Order accordingly.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF FEBRUARY, 2015.

FARAH S. M. AMIN

JUDGE

In the presence of:

Mr. Mbiu court clerk.

Mr. Aketch for Plaintiff.

No appearance for Defendant.