



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 134 OF 2013

AFRI VENTURES (KENYA) LIMITED.....PLAINTIFF

• VERSUS -

TURBO HIGHWAY ELDORET LIMITED.....DEFENDANT

RULING

1. The application before me is for summary judgment.
2. According to the plaintiff, it sold and delivered goods to the defendant. The nature of the goods which the plaintiff sold to the defendant was fertilizers.
3. It is the plaintiff's case that after the defendant had received the goods, the defendant wrote to the plaintiff confirming that it owed it the sum of Kshs. 68,604,000/-.
4. As the plaintiff had supplied goods worth Kshs. 78 million to the defendant, it was the plaintiff's contention that the balance of Kshs. 68 million was the legitimate balance after the defendant had paid the sum of Kshs. 10 million.
5. Save for the principal sum of Kshs. 68 million the plaintiff said that it was entitled to claim interest on the outstanding balance at the rate of 2% per month.
6. The said claim for interest was described as an express term of the contract between the parties.
7. Another element of the plaintiff's claim was in relation to Storage charges, submitted the plaintiff.
8. Mr. Khanna, the learned advocate for the plaintiff, submitted the storage charges were recoverable from the defendant pursuant to Condition Number 8 of the contract between the parties.
9. In the result, the plaintiff believes that it had proved its case against the defendant, thus warranting the grant of summary judgment.
10. But the defendant opposed the application.
11. The first point that was urged by the defendant was the failure by the plaintiff to file any affidavit in support of the application.
12. In the absence of a supporting affidavit, it was the defendant's contention that the plaintiff had failed to adduce any evidence.
13. The defendant noted that whilst the plaintiff was canvassing the application, it made reference to the plaintiff's List of Documents. As those documents had not been annexed to any affidavit, the defendant asserted that the said documents had not yet become exhibits.
14. But even assuming that those documents could be relied upon by the plaintiff, to support the application for summary judgment, the defendant submitted that the letter in which it is said to have confirmed the debt, was not written by the defendant.
15. The defendant submitted that the receipt of the plaintiff's letter could not be deemed to have constituted an acceptance of the contents of the said letter.
16. In any event, the defendant considers its Defence as raising serious triable issues.
17. Mr. Mutiso, the learned advocate for the defendant, submitted that his client was entitled to

- unconditional leave to defend the suit.
18. When replying to the defendant's submissions, Mr. Khanna advocate submitted that there was no requirement that the application should specify that it was supported by an affidavit. As far as he was concerned, it was sufficient that an affidavit was attached to an application.
 19. The affidavit which was filed alongside the application was sworn by **RAJEEV JAIN**, a Director of the plaintiff company.
 20. Although it was not mentioned in the application, the said affidavit was described as a "*Supporting Affidavit*".
 21. The deponent told the court that the defendant was truly indebted to the plaintiff, in the sum of Kshs. 97,558,917.15 in respect of fertilizer which the plaintiff sold to the defendant in the year 2011. He added that the sum claimed was inclusive of interest and also storage charges, as per the written agreement.
 22. Therefore, the deponent believed that there was no defence to the suit.
 23. No documents were attached to the plaintiff's supporting affidavit.
 24. Secondly, the said affidavit did not make reference to any document save for the written agreement and the plaint. The said written agreement was not identified by date.
 25. In a nutshell, the applicant did not put forward its application and supporting affidavit, in the regular manner. When I make reference to "*the regular manner*", I mean that the application would specify that it was supported by an affidavit of a particular person. Secondly, the affidavit in support of the application would provide details of facts, and it would also exhibit any documents that helped to prove the case being put forward.
 26. In my considered view, the style adopted by the plaintiff is wanting. It ought to be discouraged.
 27. However, I do not think that the failure to present the application in the regular manner is necessarily fatal to the application, of itself.
 28. Meanwhile, the plaintiff had filed its List of Documents, alongside the plaint.
 29. As far as the plaintiff was concerned, the requirement that parties should file their respective Documents together with their pleadings implied that such documents had already been produced by the party who filed any such documents.
 30. In my considered view, the List or Bundle of documents, which is filed together with pleadings cannot be said to have been already produced in evidence, simply by virtue of the fact that the party had made copies thereof available to the court.
 31. The reason why the Civil Procedure Rules were amended, so that parties are now required to make full disclosure at the earliest opportunity, was to make it possible for the other party to know the case he was to meet.
 32. Previously, parties would use evidence as if they were weapons of guerilla war-fare. A party could keep his ace up his sleeve and only choose to unleash it at a time when he thought that the opposite party could not have any opportunity to respond to it.
 33. The delay in the provision of evidence led to trial by ambush! There was no fairness in a system which allowed or condoned the late disclosure of documentary evidence.
 34. Under the current system, each party was expected to lay his evidence on the table, at the earliest opportunity.
 35. After he had done so, the opposite party would respond to the whole case, in one go.
 36. Thereafter, the court could get to the stage of trial sooner than was possible under the old rules.
 37. But just because the party had made available the documents, did not necessarily bar the other party from raising objections to the admissibility of such documents.
 38. For instance if a party wished to have the opportunity to cross-examine the author of a medical report, he could object to the production of such a report of the witness.
 39. Order 14 of the Civil Procedure Rules addressed the procedure for the production of documents, as evidence. It is clear from Order 14 Rule 1 that it is only the documents which are admitted in evidence which shall be endorsed in the prescribed manner. By necessary implication, therefore, it is possible that some of the documents contained in the Bundle of Documents filed by a party, may not be admissible in evidence.
 40. Furthermore, the List and Bundle of Documents need not be filed in court under oath. Therefore, if such documents were deemed to be evidence simply because a party expressed the wish to rely upon them, that would imply that the evidence was received without the disclosure of the name of the witness who was producing them, and also without the said witness being sworn. That would

- be wrong.
41. Having so held, it follows that the plaintiff herein did not produce any documentary evidence to support its application for summary judgment.
 42. In this case, the defendant asserts that it used to advise the plaintiff on each occasion, about the identity of the defendant's nominated transporter.
 43. The defendant went on to specify the particulars of the vehicles whose owners they did not know, but who the plaintiff allegedly gave fertilizer, to enable such vehicles ferry the said fertilizer to the defendant.
 44. The defendant's position was that it did not receive the fertilizer which the plaintiff had allegedly given to those unknown persons.
 45. If that is the correct factual position, the defendant would not be obliged to pay for such fertilizer.
 46. The defendant also said that it did not have any relationship with a consignee named **COAST FARMCARE**, who the plaintiff allegedly delivered one consignment to.
 47. Again, to my mind, if the defendant proved that assertion, the issue arising would be why it ought to be compelled to pay to the plaintiff, the value of the fertilizer which may have been delivered to a person other than the defendant.
 48. There is also an assertion by the defendant that 500 bags of fertilizer were allegedly delivered to it, in Kitale. If the defendant does not carry out any operations in Kitale, as they have said, then it may well be justifiable for them to decline to pay for the fertilizer which was not delivered to them.
 49. The defendant also pointed at a duplicated entry in the plaintiff's records. If the defendant were to prove the alleged duplication in the records, that would reduce the overall amount that could be payable to the plaintiff.
 50. Another matter which the defendant raised was in relation to the lower weights of the fertilizer, in the bags actually received by the defendant.
 51. Surely, if the quantity of the fertilizer which was received by the defendant was less than it should have been, the plaintiff could not insist that the defendant should pay a price for the full weight.
 52. Lastly, the defendant asserted that whereas the plaintiff was supposed to supply free-flowing fertilizer, they supplied some fertilizer which was sub-standard. The allegation made by the defendant was that the fertilizer was caked, and was thus unfit for the intended purpose.
 53. Again, if the defendant were to prove that some of the fertilizer it received from the plaintiff was not of merchantable quality, the plaintiff could not insist that it be paid for such fertilizer.
 54. In the final analysis, the defendant contends that the value of the fertilizer which was of good quality, and which it received from the plaintiff, was Kshs. 35,585,939.25.
 55. As against that value, the defendant had paid to the plaintiff Kshs. 37,568,950/-.
 56. Therefore, it was the defendant's case, that it had actually over-paid the plaintiff by Kshs. 1,953,010.75.
 57. But the plaintiff insisted that the defendant received goods worth Kshs. 78 million; and had only paid Kshs. 10 million.
 58. If the plaintiff was right, then it would follow that the defendant should pay the balance of the purchase price.
 59. The question therefore is;

“Did the defendant confirm to the plaintiff, in writing that it owed Kshs. 68,604,000/-?”

60. The plaintiff said that the confirmation is contained in the letter dated 2nd July 2012.
61. The first point worthy of note is that it was on a letter –head of the plaintiff.
62. I now reproduce the contents of the said letter:

“Dear Sirs,

For the purpose of our year-end audit, kindly compare the balances owed to us at 30th June 2012 as shown below with your records and sign as applicable and return directly to us or our Auditors PKF Kenya at the above address.

The balance owed to us by you according to our records at this date was Kshs. 68,604,000.00.

If you do not agree with the balance, kindly note the figure shown in your records and if possible, give particulars of the reconciling items.

Your prompt attention to this request will be appreciated. This is not a request for payment. Please do not send payment to our auditors.

We enclose a stamped self-addressed envelope for your convenience. Alternatively you may scan and send your response by email or fax to our above address.

Yours faithfully,

- 1. We confirm that the amount owing by us was as stated above.*
- 2. We do not agree that the amount owing by us is correctly shown and set out the difference on the reverse of this letter.*

For and on behalf:

Afriventures Kenya Ltd

(Signed)

Authorized signatory”.

- 63. The said letter bears a stamp which appears to have been affixed by the defendant. Close to the said stamp, which is dated 16th August 2012, there was a signature.*
- 64. On a prima facie basis, I find that that letter does not constitute an admission by the defendant.*
- 65. The letter was in the nature of a request from the plaintiff, who wished the defendant to indicate to their auditors whether or not the sum of Kshs. 68,604,000.00 was the correct outstanding balance due from the defendant to the plaintiff.*
- 66. The letter made it clear that the defendant could either confirm the accuracy of the balance cited by the plaintiff, or, alternatively, the defendant had the option to specify their own balance, with details of the reconciling items.*
- 67. Even assuming that the signature next to the defendant’s stamp was that of the defendant, that did not constitute an admission.*
- 68. Secondly, I find that the defences put forward by the defendant raised serious triable issues. Those issues include;*

“i) The actual weight of fertilizer sold to the defendant: were each of the bags weighing 50 kgs as stated by the plaintiff or were there many bags which were under-weight?

ii) When the plaintiff dispatched goods through vehicles which were unknown to the defendant, did the goods reach the defendant?

iii) Were some of the goods delivered to persons who were not known to the defendant?

iv) Was there any duplication in some of the plaintiff’s records, regarding the goods delivered to the defendant?

v) Were some of the goods delivered to the defendant of unmerchantable quality?

vi) What was the value of the goods sold and delivered to the defendant? Was it Kshs. 35,585,939.25 as stated by the defendant, or was it Kshs. 78,604,000/- as stated by the plaintiff.

Vii) How much did the defendant pay to the plaintiff? Was it Kshs. 10,000,000/- as stated

by the plaintiff or was it Kshs. 37,568,950/- as stated by the defendant?

69. In the light of all those issues, I find that the defendant is entitled to an unconditional leave to defend itself against the claims which the plaintiff has made against it.

70. There is no merit in the plaintiff's application for summary judgment. The said application is dismissed, with costs to the defendant.

DATED, SIGNED and DELIVERED at NAIROBI this 30th day of July 2014.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Khanna for the Plaintiff.

Mrs. Shaw for Nyairo for the Defendant.

Mr. C. Odhiambo, Court clerk.