



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 597 OF 2012

KENYA RAILWAYS CORPORATION.....PLAINTIFF

VERSUS

KENYA OIL COMPANY LIMITED DEFENDANT

J U D G E M E N T

1. By a Plaint dated 12th September 2012 and filed in court on 14th September 2012 the Plaintiff sued the Defendant seeking the following orders:-
 - a. ***The sum of Kshs.6,814,064.00 due to the Plaintiff on account of transport services rendered to the Defendant.***
 - b. ***Interest on the said sum from 31st October 2006 till payment in full.***
 - c. ***Costs of the suit and interest thereon at court rates.***
2. The claim was based on account of transport services rendered to the Defendant by the Plaintiff particulars of which are contained in the Plaint.
3. The Defendant filed Defence dated 17th October 2012 in which it denied the claim, stating that the contract between the parties had an arbitration clause so that any dispute had to go for arbitration.
4. On 3rd November 2012 the Plaintiff replied to the Defence and joined issue with the Defendant. Parties filed agreed statements of issues and their documents in readiness for hearing of the matter.
5. The parties filed agreed issues as follows:-
 - a. ***Whether the Plaintiff is owned by the Defendant Kshs.6,814,064 due to services rendered.***
 - b. ***Whether the Defendant is estopped from demanding arbitration having filed a Defence and in view of the provisions of the Arbitration Act.***
 - c. ***Whether the Plaintiff's claim is time barred.***
 - d. ***What is the appropriate order as regards costs of the claim.***
 - e. ***Costs shall be in the cause.***
6. The Plaintiff relied on the evidence of a single witness, Mr. Douglas Mwangi Munyue (PW 1) who adopted his witness statement dated 24th October 2014. He also adopted the Plaintiff's bundle of documents, and specifically relied on pages 10 – 49 and 50 – 53 of the bundle which contained invoices and statements. In summary the Plaintiff's witness testified that he is employed in the Plaintiff's service as an accountant in the department of Finance. The Plaintiff is a body corporate with perpetual succession and a common seal and has power to sue and be sued in its corporate name and to acquire, hold and dispose off movable and immovable property for its purposes. It is established pursuant to the provisions of the Kenya Railways Act, Cap 397 of the Laws of Kenya, which Act governs its operations and affairs. The witness testified that he was aware that the Plaintiff runs railway transport in Kenya and renders transportation of persons,

- goods and cargo services on its railway network within and in Kenya and elsewhere. He was also aware that on or about 31st October 2006, the Defendant became indebted to the Plaintiff in the sum of Ksh.s7,244,346.74 due to transport services rendered to the Defendant by rail on the Defendant's own request. Subsequently and as a consequence of part payment/settlement by the Defendant the amount due to the Plaintiff reduced to the sum of Kshs.6,814,064.00. However the Defendant has completely failed and/or refused to pay the said sum despite several demands. The Plaintiff's claim as against the Defendant is for the sum of Ksh.s6,814,064/= which is due and outstanding as demonstrated above. The witness prayed for judgement for the said amount.
7. The Plaintiff was cross-examined only as to whether he understands the term 'arbitration'. His answer showed that he did not understand the term 'arbitration'.
 8. The Defence called no evidence.
 9. I have carefully considered the claim as contained in the Plaintiff and the defence. PW 1 testified that the Defendant owed the Plaintiff a sum of Kshs.6,814,064/= in the Plaintiff. PW 1 also testified, truthfully, about the transport services which were rendered to the Defendant. Invoices at pages 10 – 49 of the Plaintiff's bundle show that the Defendant was invoiced for the said services. The statement of account at pages 50 – 53 of the said bundle show the outstanding sums which the Defendant neglected or refused to pay. The Defendant did not challenge any of this evidence. The Defendant's counsel only raised the issue as to whether the witness understood what arbitration was. The Defendant also produced no witness. The law is that a party who does not produce a witness to controvert what the claimant says either has no evidence to controvert the claim, or his evidence would be adverse to the party itself. The inference I draw is that the Defendant had no evidence to disprove the claim and the testimony of PW1. PW 1's testimony remains unchallenged, and the content of the Plaintiff stands proved upon such testimony.
 10. I have also considered the Plaintiff's testimony in light of the issues raised. As to issue number one the Plaintiff through its evidence proved on a balance of probability that the Defendant owed it Kshs.6,814,064/= on account of transport services rendered.
 11. On issue number 2, as to whether the suit should have gone to arbitration, the Plaintiff never testified on the same. However, the law is that a party which insists on arbitration process loses the right upon filing a defence. Indeed, the issue of arbitration ceased to be a contentious issue and was barely referred to by either counsel.
 12. The third issue was whether the Plaintiff's claim is time barred. This issue never came up during the hearing, but having considered the bundle of documents filed by the Plaintiff there is no evidence that the Plaintiff claim was time barred.
 13. The last issue relates to costs. Pursuant to the foregoing, it is my Judgement that the Plaintiff has proved its case on a balance of probability and is entitled to the orders and prayers sought plus costs of the suit.
 14. In the upshot, Judgement is hereby entered for the Plaintiff against the Defendant in the following terms:-
 - a. ***Kshs.6,814,064/=.***
 - b. ***Interest on the said sum at court rates from date of filing of suit viz 12th September 2012 till payment in full.***
 - c. ***Costs of the suit and interest thereon at court rates.***

That is the Judgement of the court.

READ, DELIVERED AND DATED AT NAIROBI THIS 18TH DAY OF NOVEMBER 2014

E. K. O. OGOLA

JUDGE

PRESENT:

Nyaange for the Plaintiff

No appearance for Defendant

Teresia – Court Clerk