



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 243 OF 2009

LIBYA OIL KENYA LIMITED.....PLAINTIFF

VERSUS

AFRICAN SAFARI CLUB LIMITED.....1ST DEFENDANT

AFRICAN SAFARI AIRWAYS LIMITED.....2ND DEFENDANT

MARA BUFFALO CAMP.....3RD DEFENDANT

STARLINE CRUISES LIMITED.....4TH DEFENDANT

**JUDGEMENT**

1. By a Plaintiff filed in court on 8<sup>th</sup> April 2009 and amended by an Amended Plaintiff dated 9<sup>th</sup> May 2014 and filed in court on 12<sup>th</sup> May 2014 the Plaintiff sets out his claim as follows:-

- 1. U.S.\$238,964.60 (the equivalent of KShs.19,026,361.45 as at the time of filing suit);**
- 2. KShs.8,093,314/=;**
- 3. Interest thereon at Court rates until payment in full of the said sum;**
- 4. Costs of this suit; and**
- 5. Any such further or other relief as this Honourable Court may deem fit and just to grant.**

2. The Plaintiff's case, as per the pleadings is that the Plaintiff at all material times to this suit was carrying on the business of the sale, supply and marketing of petroleum products. At all times material to the suit the Defendants were customers of the Plaintiff, purchasing its petroleum products for use in their operations in the tourism industry. The 1<sup>st</sup> Defendant owned and operated hotels in the Coast region of Kenya, the 2<sup>nd</sup> Defendant was an international airline charter company contracted for the purposes of transporting tourists to and from Kenya, the 3<sup>rd</sup> Defendant owned and operated a hotel and/or tented camp in the Masai Mara Game Reserve in Kenya and the 4<sup>th</sup> Defendant owned and operated luxury cruise liners. The 1<sup>st</sup> Defendant invariably placed orders for petroleum products for its own use and for the use of the other Defendants who were all affiliate companies and the 1<sup>st</sup> Defendant's management represented all the Defendants in the commercial relationship and transactions with the Plaintiff. The Plaintiff's case is for the recovery of a debt due and owing from the Defendants for petroleum products sold and delivered to the Defendants and/or their nominee and/or associate and/or affiliate companies at their express request on diverse dates in 2008. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants in purported part-payment of the said debt drew and/or caused to be drawn and delivered to the Plaintiff six cheques as are set out in the Amended Plaintiff. Each of the said cheques was dishonoured in that they were returned unpaid when duly presented for payment by the Plaintiff and the said Defendants were duly notified of such dishonour. Despite the Defendants expressly acknowledging and admitting owing the Plaintiff all or part of the said debts and numerous express promises and proposals made by the Defendants to settle the said debt, the Defendants have, to date, not paid the Plaintiff any sums in satisfaction of the same. Despite formal demand for payment made by the Plaintiff's Advocates on record, the Defendants have failed and/or neglected and/or refused to pay the Plaintiff the said sums hence the filing of this suit.

3. To prove its case the Plaintiff relied on the following pleadings and court documents.

**1. Amended Plaintiff dated 9<sup>th</sup> May, 2014 and filed in this Court on 12<sup>th</sup> May, 2014;**

**2. Plaintiff's List of Documents dated 25<sup>th</sup> April, 2012 together with attached bundle containing copies of the same;**

**3. Plaintiff's Supplementary List of Documents dated 4<sup>th</sup> July, 2012 together with attached bundle containing copies of the same;**

**4. Plaintiff's Statement of Issues dated 25<sup>th</sup> April, 2012;**

**5. Amended Plaintiff's List of Witnesses dated 19<sup>th</sup> June, 2013;**

**6. Witness Statement of Donald Mwenga –dated 20<sup>th</sup> June, 2012;**

**7. Witness Statement of Mark Mutuku Musembi dated 19<sup>th</sup> June, 2013;**

**8. Witness Statement of Omollo Arthur Omondi dated 19<sup>th</sup> June, 2013;**

4. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants filed a Defence to the Plaintiff's claim on 22<sup>nd</sup> May 2009. However, none of the Defendants have filed a Defence or Amended Defence to the Amended Plaintiff, and for that purpose the Plaintiff's claim is not defended by the 3<sup>rd</sup> and 4<sup>th</sup> Defendants, and I therefore hereby enter Judgement as against the 3<sup>rd</sup> and 4<sup>th</sup> Defendants without any further delay.

5. In their Defence filed in court on 22<sup>nd</sup> May 2009 the 1<sup>st</sup> and 2<sup>nd</sup> Defendants deny the Plaintiff's claim in its entirety and deny having made any orders for supply of petroleum products for its nominees or associates or affiliates as alluded or at all and put the Plaintiff to strict proof thereof.

6. The hearing of the suit took place on 28<sup>th</sup> October 2014 in the absence of the Defendants or their advocate. However the firm of Kamoti Omollo & Company Advocates who have been on record for the Defendants was served with a Hearing Notice for that day. The Notice was received in their office on 22<sup>nd</sup> August 2014, and the Plaintiff filed an Affidavit of Service on 13<sup>th</sup> October 2014 to the effect. Having been satisfied that the service was proper the court allowed Mr. S.A. Amin for the Plaintiff to proceed ex-parte.

7. The Plaintiffs called two witnesses – Mr. Mark Mutuku PW 2 and Mr. Omollo Arthur Omondi – PW 3. PW 1 – Donald Mwenga had by the time of the hearing left the employment of the Plaintiff and was not available to give evidence.

8. In his testimony, P.W.2 adopted and relied upon his Witness Statement and produced and took the Court through the documents he relied upon in his evidence, namely the bundle of documents set out in the Plaintiff's List of Documents and the Plaintiff's Supplementary List of Documents entered into evidence and marked as Plaintiff's Exhibit Number 1 ("P.E.1") and Plaintiff's Exhibit Number 2 ("P.E.2") respectively. P.W.2 relied on the said documents in their entirety.

9. P.W.2 testified under oath *inter alia* as follows. That he is a competent witness to testify in this matter; The Amended Plaintiff is a true statement of the Plaintiff's claim; The bundles of documents produced as exhibits "P.E.1" and "P.E.2" are cogent evidence in support of the Plaintiff's claim; "P.E.1" and "P.E.2" consist of copies of **email correspondence** between the parties (pages 1-16 and pages 79-86 of "P.E.1" ), a letter from the 2<sup>nd</sup> Defendant to the Plaintiff (page 101), copies of **Statements of Account and supporting Invoices** and other accounting documents such as Delivery Receipts and Advices (pages 17-78 and pages 87-92 of "P.E.1" and all pages of "P.E.2"), **dishonoured cheques** (pages 93-100 of P.E.1) and **letters of demand** from the Plaintiff's Advocates to the Defendants (pages 102 and 104 of P.E.1); Emails were the customary mode of ordering product by the Defendants; Requests by emails from Defendants to the Plaintiff dated Saturday 16<sup>th</sup> February, 2008 on page 2A of "P.E.1" were shown as examples of the orders placed for product; The promise by email from Defendants to the Plaintiff dated Monday 3<sup>rd</sup> March, 2008 on page 8 of "P.E.1" was shown as an example of an express promise to pay; Another express promise to pay by the 1<sup>st</sup> Defendant's Finance Director, Mr. Satish C. Jain, is seen in the emails to the Plaintiff dated 31<sup>st</sup> March, 2008 and 7<sup>th</sup> April, 2008 on pages 12 and 13 of "P.E.1"; Evidence of the 2<sup>nd</sup> Defendant's acknowledgement and admission of its indebtedness and promise to pay can be seen from its letter on page 101 of "P.E.1". The Plaintiff's Advocates' letters of demand and notices of intention to sue are at pages 102 and 105 of "P.E.1"; The Defendants have never paid the Plaintiff any sums in respect of the said debt; On 12<sup>th</sup> August, 2008 P.W.2, P.W.3 and other representatives of the Plaintiff met with the representatives of the management of the Defendants namely Jackline Odero (1<sup>st</sup> Defendant's Legal Counsel), Satish C. Jain (1<sup>st</sup> Defendant's Finance Director) and Renato Bachmann (4<sup>th</sup> Defendant's Managing Director) at their offices during which meeting repeated promises to pay were made on behalf of the Defendants. No concrete proposals or payments, however, ever materialized.

10. In his testimony, P.W.3 under oath, adopted and relied upon his Witness Statement. Both witnesses testified under oath that the Amended Plaintiff is a true and correct statement of the Plaintiff's claim and that to date the Defendant has not paid the Plaintiff the sums claimed in the suit. Both witnesses testified under oath that the Defendants are indebted to the Plaintiff as pleaded in the Amended Plaintiff.

11. The Defendants called no witnesses and presented no evidence.

12. The Plaintiff filed written submissions on 30<sup>th</sup> October 2014. The Plaintiff's submitted that The Plaintiff's claim is determinable on the facts and basic principles of the Law of Contract. The Defendants having ordered and taken delivery of the said petroleum products in question from the Plaintiff, the Defendants are lawfully indebted to the Plaintiff in the sum claimed and must pay the Plaintiff the said sum. The Plaintiff's counsel submitted that in the absence of any evidence to controvert, challenge or contradict the testimony of the Plaintiff's Witnesses, the Plaintiff's evidence is manifestly reliable and credible and should be accepted a such by this court.

13. The Plaintiff raised the following issues which it answered in the affirmative as follows:-

*i. Whether the Plaintiff sold and supplied petroleum products to the Defendants and/or their nominees and/or associates and/or affiliate companies and/or designated aircraft as pleaded in the Plaintiff? The Plaintiff's answer was "Yes".*

*ii. Whether the Defendants or any of them drew and/or caused to be drawn, issued and delivered to the Plaintiff cheques in purported part payment of the debt which cheques were subsequently dishonoured? The Plaintiff's answer was "Yes".*

*iii. Whether the Defendants or any of them defaulted in their contractual obligations to the Plaintiff? The Plaintiff's answer was "Yes".*

*iv. Whether the Plaintiff made numerous demands for payment of the aforesaid debt to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants? The Plaintiff's answer was "Yes".*

*v. Whether the Defendants or any of them expressly acknowledged and admitted all or part of the said debt? The Plaintiff's answer was "Yes".*

*vi. Whether the Defendants were issued with a Notice of Dishonour of the said cheques and a legal demand for payment of the debt owing to the Plaintiff? The Plaintiff's answer was "Yes".*

*vii. Whether the Defendants are currently indebted to the Plaintiff in the sum of K.Shs.8,093,314/= and United States Dollars 238,964.60? The Plaintiff's answer was "Yes".*

*viii. Whether the Plaintiff has suffered loss and damage due to the Defendants' actions as pleaded in the Plaintiff? The Plaintiff's answer was "Yes".*

*ix. Is the Plaintiff entitled to the reliefs sought in the Plaintiff? The Plaintiff's answer was "Yes".*

14. I have carefully considered the Plaintiff's claim, its submission and the Defence filed by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants on 22<sup>nd</sup> May 2009. The said Defence is a general denial of the Plaintiff's claim. It needed to be supported by some kind of oral evidence, which was not there. In the absence of any evidence by the Defendants the Defence filed is a sham and a mere denial.

15. I have also considered the Plaintiff's evidence. I am satisfied with the testimony of the Plaintiff's Witness PW 2 and PW 3. They were candid and proved the allegations contained in the Plaintiff. The evidence proved the existence of the supply of petroleum products contract. Their evidence also proved that the cheques which were issued for part payment were dishonoured when presented for cashing. The witnesses proved on a balance of probabilities that the Defendants or some of them acknowledged and admitted all or part of the debt. Their evidence in totality prove that the Defendants are currently indebted to the Plaintiff in the sum of Kshs.8,093,314/= and USD 238,964.60. Without the Defendant's testimony this court has no basis to doubt the testimonies of PW 1 and PW 2. In any event, failure by the Defendants to provide any evidence in support of their Defence raises presumption that indeed the Defendants either do not have any Defence to the claim, or that if they do, such evidence is most likely prejudicial to the Defendant's case and hence the reason the same has been withheld.

16. In the upshot, I am satisfied that the Plaintiff has proved its claim on a balance of probability and I hereby enter Judgement for the Plaintiff against the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants in the following terms:-

**1. U.S.\$238,964.60 (the equivalent of KShs.19,026,361.45 as at the time of filing suit);**

**2. KShs.8,093,314/=.**

**3. Interest thereon at Court rates until payment in full of the said sum.**

**4. Costs of this suit.**

Orders accordingly.

**READ, DELIVERED AND DATED AT NAIROBI THIS 16TH DAY OF DECEMBER 2014**

**E. K. O. OGOLA**

**JUDGE**

**PRESENT:**

S. Amin for the Plaintiff

No appearance for the Defendants

Teresia – Court Clerk