



**REPUBLIC OF KENYA**

**High Court at Nairobi (Milimani Commercial Courts)**

**Civil Case 417 of 2006**

**TOTEM SERVICE STATION LIMITED.....PLAINTIFF**

**V**

**THE ATTORNEY GENERAL.....DEFENDANT**

**J U D G E M E N T**

**1.** The Plaintiff instituted this suit by way of an amended Plaint dated **8<sup>th</sup> August 2006** and filed in Court on the following day. The Plaintiff's claim is for **Kshs. 77,113,708** as at **30<sup>th</sup> May 2006** from the Defendant for fuel, petroleum products and services supplied and rendered by the Plaintiff at Nakuru for Provincial Works Officer and District Works Officer vehicles from 1996 to 2002. According to the Plaintiff, the amount is inclusive of the principal amount being **Kshs. 19,387,106.40** and the rest is accrued interest.

**2.** The Defendant controverted the Plaintiff's claim by filing a Defence dated 30<sup>th</sup> October 2006. In the Defence, The Defendant denies owing the Plaintiff the sums claimed and states that it never entered into any contract for supply of fuel or petroleum products with the Plaintiff.

**3.** The parties herein complied with the pre-trial directions as per order 11 of the Civil Procedure Rules and the matter was set down for hearing. The matter first came up for hearing on 15<sup>th</sup> October 2012 with the Plaintiff opening its case. The Plaintiff called one witness, Mr. Mohideen Jilani, PW 1, who was the Director of the Plaintiff Company. He reiterated the facts as stated in his witness Statement dated 26<sup>th</sup> June 2012.

**4.** PW 1 testified that the Plaintiff was the supplier for fuel to the Government's department in Nakuru from 1990 to 2003 when they stopped since they were not being paid. He also testified that since the Plaintiff instituted the suit, they have received two payments being Kshs. 6,671,367 on 26/09/2007 and Kshs. 3,466,526/= on 26/07/2011. He therefore informed the Court that currently, the Plaintiff's claim was for Kshs. 9,201,213/=.

**5.** PW 1 also produced a bundle of documents filed on 27<sup>th</sup> June 2012 as exhibit No. 1. Referring to the said bundle, it was his testimony that the Government had admitted that they owed him money. He testified that the Plaintiff was given written authority to supply the fuel and that the Plaintiff had already submitted to the Government invoices and delivery notes. He prayed to the Court to grant the Plaintiff interest because the Plaintiff was operating on an overdraft facility to run its business.

**6.** On cross-examination, PW 1 confirmed that the Plaintiff supplied fuel to the Government from 1990 to 2003 save that the Plaintiff's claim was from 1996. He was referred to the letter of acceptance at page 43 of the Plaintiff's bundle of documents and he acknowledged that the same related to the years 2001 to 2002. PW 1 testified that the Plaintiff had an agreement with Agip (K) Ltd and that the Plaintiff was a subcontractor with Agip (K) Ltd. It was also his testimony that the prices of fuel kept changing but that the Plaintiff used a constant price in their documents.

**7.** On re-examination, PW 1 testified that the Plaintiff used standard prices and that the Government had accepted the Plaintiff's offer on the agreed prices.

**8.** The Defendant's case came up for hearing on 7<sup>th</sup> March 2013. The Defendant called two witnesses; Mr. Evans Achimba, a Senior Procurement Officer and Mr. Joseph Tarus a Senior Accountant both working at the Ministry of Roads.

**9.** Mr. Evans Achimba, DW 1, relied on his witness statement filed on 1<sup>st</sup> November 2012. DW 1 explained to the Court on how the Government advertises for bidders and how the successful ones are notified and finally confirmed. It was his testimony that between the year 1997 and the year 2000, the Plaintiff was not a supplier to the Government. The Plaintiff was a subcontractor of Agip (K) Ltd who was on the Government's list of suppliers. It was therefore his testimony that the Plaintiff's claim was to be directed to Agip (K) Kenya and not to the Defendant.

**10.** It was also DW 1's testimony that the documents submitted by the Plaintiff in support of the current suit were not valid. He was referred to a hand written order at page 111 of the Defendant's Bundle of

documents and he testified that from the said document somebody had instructed the Plaintiff to supply some products. DW 1 testified that where a Local Purchase Order (LPO) was given it was mandatory that a cash sale receipt be issued. He further testified that a mere chit (hand written note) could not be issued to become the basis of an order.

**11.** On cross-examination, DW 1 confirmed that fuel was supplied to the Government. He also testified that the hand-written document at page 111 of the Defendant's Bundle of document was not rubber stamped. DW 1 was referred to page 12 of the Plaintiff's Bundle of documents which was a letter from the Ministry of Roads Public Works and Housing (as it then was) dated 20<sup>th</sup> February 2004 acknowledging that they owed the Plaintiff more than 19 million. He testified that the said letter was a genuine document from the Government.

**12.** On re-examination, DW 1 testified that the said letter was not addressed to the Plaintiff but to the Permanent Secretary, Ministry of works. It was his testimony that the writer simply wanted to formalise what was irregularly done.

**13.** Joseph Tarus, DW 2, informed the Court that he was a member of the team appointed by the Ministry of Roads to study and analyse the facts on the claim by the Plaintiff. He testified that they looked at many documents including cash sale receipts, invoices and chits that were purportedly used to procure fuel and that the manner in which the chits were written was suspicious and out of order. He further testified that some invoices had been outstanding for a long time while the recent ones had been paid which raised suspicion.

**14.** Referring to page 47 of the Defendant's bundle of documents, DW 2 testified that some required documents of order were to be signed by authorised officers of the Ministry and no one else was to do so. It was DW 2's testimony that they also realised that the Plaintiff was using a constant price which was not in the contract and which was not the proper reflection of fuel prices in that place at that time. According to them the Plaintiff was charging almost double rates for the fuel.

**15.** On cross-examination, the issue of orders being signed by authorised officers only was raised. It was DW 2's testimony that they had made recommendations to the effect that the officers responsible be surcharged. However, it was his testimony that they were unable to identify the responsible officers.

**16.** Both parties filed their written submissions.

**17.** As the parties did not file a list of agreed issues, the Court has come up with the following issues for determination;

*a) Whether the Defendant owes the Plaintiff the sum of Kshs. 9,249,212.20, being the balance of the principal sum owed.*

*b) Whether the Plaintiff is entitled to interest amounting to Kshs. 57,726,601.50*

**18.** The Defendant has confirmed that to date the Ministry of Roads has paid a total of Kshs. 10,137,894.20 to the Plaintiff leaving a balance of Kshs. 9,249,212.20 which they dispute as owing.

**19.** The Plaintiff's witness testified on cross-examination that their claim was from the year 1996. The Defendant has denied that the Plaintiff was their supplier between the year 1996 and 2000. There is no evidence on record to the effect that the plaintiff supplied fuel to the Government during this period. The defendant confirms the same by stating that Agip (K) Ltd was their supplier between 1996 and 2000 while the Plaintiff was the sub contractor. The only evidence on record is that the Plaintiff had an agreement for supply of fuel with the Government between the year 2001 and 2002.

**20.** The above analysis notwithstanding, it is not clear as to what period the balance of Kshs. 9,249,212.20 which is disputed by the Defendant relates to. The Defendant has not expressly stated that the said amount accrued between the year 1996 and the year 2000. Therefore, what remains for this court to determine is whether the said amount is due and owing to the Plaintiff.

**21.** The main basis for the Plaintiff's claim seems to be the fact that the Government acknowledged owing the debt. The Plaintiff relies on the letter dated 20<sup>th</sup> February 2004 at page 12 of the Plaintiff's Bundle of documents. DW 1 acknowledged the letter as a genuine document from the Government.

**22.** The question that lingers is whether there is any proof that direct payments were made to Agip (K) Limited for the supplies made on its behalf by the Plaintiff. It is not disputed that the orders were directed to the Plaintiff and from the evidence on record it has been admitted that fuel was supplied to the Government. In that case it is not material whether the orders made were irregular or not. The Defendant's witnesses have not dispelled the existence of a contract of supply of fuel between the parties. The two witnesses all agree that although the goods in issue were supplied by the Plaintiff to the Defendant's offices in Nakuru, the documentation is not as per the requirements of the Government. In my view, however, documents speak for themselves. The letter dated 20<sup>th</sup> February 2004 at page 12 of

the Plaintiff's Bundle is no ordinary letter. It was not disputed, and in my view amounted to an admission of the amount owed to the Plaintiff by the Defendant. The letter states in part:-

*"I wish to acknowledge that this Ministry owes the above firm more than Kshs.19 million (see attached sheet) broken as follows:-*

*- Kshs.9,202,039.90*

*- Kshs.11,185,066.50"*

The said letter was written to the Permanent Secretary of the relevant Ministry by the Provincial Works Officer, who stated that they were willing to settle the bill but for the constraints explained in the letter.

23. It is noteworthy that the Defendant then subsequently paid part of the claim leaving a balance of Kshs.9,249,211/20. Although D.W. 2 explained that he was a member of a committee which verified the invoices, he was unable to justify why the remaining part of the claim was not paid. Apart from establishing that there were irregularities in the supply of the fuel, the report they made only recommended that any Government Officer involved in the irregularities be surcharged for any losses that were incurred. In my view, if the Defendant was not satisfied with the claim, it should not have made the part payment but should instead have rejected the entire claim if indeed the orders were irregular. However, any alleged irregularities was now cured by the aforesaid letter dated 20<sup>th</sup> February 2004.

24. This then also takes care of the dispute in relation to the applicable prices per litre. The Defendant has provided in its submissions various formulas for reaching the applicable price per litre. However, I am satisfied with the explanation by the Plaintiff that the applicable price kept on changing and he kept on informing the Defendant of the changes. I believe that the content of the above letter was reached after taking into account all these factors. The Defendant has cited the case of **CHOITRAM – VS – NAZARI [1984], KLR 327** in which it was stated that:-

*“. . . admissions have to be plain and obvious, as plain as a pikestaff and clearly readable because they may result in Judgement being entered. This must be obvious on the face of them without requiring a magnifying glass to ascertain their meaning. Much depends on the language used."*

Using this authority the Defendant urged the court not to treat the aforesaid letter dated 20<sup>th</sup> February 2004 as an admission.

25. In my view, however, the said letter is merely part of the evidence adduced before the court. The letter is authentic and has not been disowned. The allegations contained in it have not been denied. On its own it stands as a strong evidence irresistibly indicating the truth of the contents therein. But if there was any doubt, that has been erased by the testimonies of the Plaintiff and Defendant witnesses.

The claim for the balance of the principal sum i.e. Kshs.9,201,213/= has been proved by the Plaintiff on the balance of probabilities.

26. What remains for me to address is the issue of interests. The Plaintiff claims accrued interests at Kshs.57,726,601/50 as at 30<sup>th</sup> June 2006. The determination of interest is always left at the discretion of the court. The court must consider all relevant circumstances before awarding or refusing to award interests. That is particularly so when the amount claimed is so huge, like in this particular case. The first issue to consider in this case is why would the Defendant, a Government, so insincerely and punitively cause a citizen businessman such business pain? When a business partner denies another sums due as huge as in this case, that act of denial can cripple somebody's business as has happened to the Plaintiff whose business has since gone under. What justification did the Defendant have to remain with the Plaintiff's money for over 25 years? An order of interest which is equitable in the circumstances is one which gives a reasonable return on the Plaintiff's capital were the Plaintiff's to decide to invest the money somewhere. The claim for interest in this case is clearly justified. In the suit, the claim for interests at Kshs.57,726,601/50 is based on the claim of Kshs.19,387,106/40. Since part of this money has already been paid, interest due can only be based on the outstanding claim of Kshs.9,201,213/=. At the time of filing the suit the Plaintiff claimed interest of Kshs.57,726,601/50 based on principle claim of Kshs.19,387,106/40. However it is not indicated the rate at which the alleged claim of interest was based. What is however, not contested, is that the claim had been outstanding as early as 1997. I will therefore apply two sets of interest regimes; before the claim was filed at a reasonable return on capital of 6 per cent per annum based on the claim of Kshs.19,202,039/90; and the second one based on the outstanding claim after the suit was filed and part payment made. This will be interest at court rates from the date of filing based on the balance of the claim i.e. Kshs.9,201,213/=.

27. In the upshot I enter Judgement for the Plaintiff against the Defendant as follows:-

- a. *Kshs.9,201,213/=.*
- b. *Interest on above (a) at court rates from the date of filing (August 2006) till payment in full.*
- c. *Interest at 6% per annum on Kshs.19,387,106/40 with effect from the year 2000 to July 2006.*

d. *Costs of the suit and interest thereon at court rates.*

e. *All interest calculation shall be based on simple interest formula.*

This is the Judgement of the court.

**DATED, READ AND DELIVERED AT NAIROBI**

**THIS 30<sup>TH</sup> DAY OF MAY 2013**

**E. K. O. OGOLA**

**JUDGE**

**PRESENT:**

M/s Matheu for the Plaintiff

Kiarie holding brief for Lukoba for the Defendant

Teresia – Court Clerk