



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 473 OF 2006

TECHARD STEAM & POWER LIMITED.....PLAINTIFF

VERSUS

MATHER & PLATT (K) LIMITED..... DEFENDANT

J U D G M E N T

1. The Plaintiff filed the suit herein against the Defendant vide a Plaint dated 22nd August 2006 claiming the following:-
 - a. *Kshs. 3,505,041/= being the amount outstanding on goods sold and delivered.*
 - b. *Costs of the suit*
 - c. *Interest on (a) and (b) above.*
2. The Plaintiff's claim was controverted by the Defendant in its Statement of Defence dated **27th September 2006**.
3. After filing the suit, the Plaintiff applied for judgment on admission for the sum of **Kshs. 741,953.10/=**. It is the Plaintiff's position that the amount has since been paid and therefore the claim has been reduced to **Kshs. 2,763,087.90/=**.
4. The hearing of the case commenced on **22nd February 2012** with the Plaintiff calling one witness in support of its case. In her examination- in- chief, **Lydia Wanjiru Kangethe**, PW 1, informed the Court that she was the Plaintiff's accountant since June 1995. She testified that the Defendant was the Plaintiff's customer with effect from 2004 and that the Plaintiff sold them assorted industrial and technical hardware items.
5. It was her testimony that the Defendant purchased the goods and supplied them to a company known as Home Oil Ltd. He further testified that sometimes the Plaintiff would make direct deliveries to Home Oil Ltd.
6. PW 1 gave evidence to the effect that there was no formal contract between the Plaintiff and the Defendant. She testified that the goods were ordered either through LPO, by phone or by employees who could come and pick the goods. The calls would be made by a Mr. Chege, Mr. Hassan, Mr. Mukururi and any could sign the LPO from the Defendant's side.
7. She further testified that after the order was made the Plaintiff would prepare delivery notes and after delivery was done invoices would be prepared. It was her testimony that the delivery notes were signed by the Defendant while the invoices were delivered directly to their stores by the Plaintiff. The settlement of the invoices was 30 days after the date of statement which would be

delivered on a monthly basis.

8. It was PW 1's testimony that the said goods were bought on credit and where some were returned the Plaintiff issued credit notes. She produced and explained to the Court a bundle of invoices, LPOs and delivery notes in support of the Plaintiff's case among them:-
 1. ***Invoice No. 53265, LPO No. 2708 amounting to Kshs. 200,750/= which was not paid. The delivery note was signed by Mr. Hassan.***
 2. ***Invoice No. 53448 for Kshs. 184,236/=. There was no LPO but a delivery note was signed and stamped. A credit note of Kshs. 69,600 was issued.***
 3. ***Invoice No. 53553 for Kshs. 367, 029/=. It had a signed delivery note but not stamped. LPO No. 27100. The invoice was not paid.***
 4. ***Invoice No. 53556 for Kshs. 30,508/=. There was a delivery note and LPO No. 27100 signed by Mr. Chege.***
 5. ***Invoice No. 53659 for Kshs. 169,657 signed by Mr. Hassan. For LPO No. 27100 a credit note was issued on 26th May 2006 and therefore the balance was at Kshs. 157,965/=.***
 6. ***Invoice No. 53669 for Kshs. 256,805 signed by Hassan and was not paid.***
9. She produced the bundle of invoices, LPOs and delivery notes as exhibit No. 1 and the bundle of credit notes as exhibit No. 2. In addition she produced a Statement of account she had prepared as of May 2004 to 30th April 2007 showing the outstanding amount at Kshs. 2,767,088/= as exhibit No. 3.
10. It was PW 1's testimony that the Defendant used to make payments by cheque accompanied by remittance advices and that payments were received at different times. She testified that some invoices were paid more than once an example being Invoice No. 53167 which she produced as exhibit No. 4. It was further her testimony that some invoices did not have LPOs but were paid.
11. On cross-examination, PW 1 confirmed that the orders were not made to her directly and that also she was not in charge of making the deliveries. However, it was her testimony that she would sometimes deal with the Defendant's sales team on phone concerning account issues or making orders. She further testified that she would be aware if there were any negotiations on prices.
12. PW 1 further confirmed that once goods were collected she would know where they were delivered by virtue of the delivery notes being signed. It was her testimony that she knew the same persons who used to receive the goods and they were; Hassan, Chege and Mukururi. She testified that the said Mr. Mukururi could order goods on phone as he was the general manager of the defendant.
13. PW 1 testified that vide a letter dated **6th July 2004**, the Defendant stated that the goods supplied were in violation of the agreed terms. He further testified that the Plaintiff did not receive this letter but that the same was later sent to the Plaintiff's lawyers. It is PW 1's testimony that there was no formal agreement between the parties and as such the Plaintiff did not understand what the Defendant meant by stating that it had violated the terms of the agreement.
14. It was further her testimony that the LPOs had terms and conditions but the same were not applicable to the Plaintiff. PW 1 clarified to the Court that the outstanding amount owed to the Plaintiff was Kshs. 2, 763,088 as the Defendant had admitted a sum of Kshs.741,953.10 and paid the same.
15. The hearing of the Defence case commenced on **25th July 2012** with the Defendant calling one

- Mr. Mwangi Kagwara Mukururi**, DW 1, as its sole witness. He introduced himself as the Company secretary of the Defendant. Mr. Mukururi testified that he was the finance director of the defendant in the years 2004 to 2006. He confirmed that the Plaintiff was on the defendant's list of approved suppliers and that the Plaintiff used to supply them with industrial goods.
16. It was DW 1's testimony that sometime in 2004 they received the accounts of the supplier and noticed that the bank statements did not agree with their accounting records. He testified that vide a letter dated **6th July 2004** he wrote to the supplier and pointed out the discrepancy.
 17. It was also DW 1's testimony that the Plaintiff had not supplied the Defendant with invoices amounting to **Kshs. 2,300,000/=**. He testified that by a letter dated **25th July 2006** the Defendant confirmed an outstanding balance of **kshs. 741,953/=** which was for goods supplied against a written order and received in the Defendant's stores. He further testified that the Defendant rejected the Plaintiff's claim save for **Kshs.741, 953/=** because they could not confirm if the goods had been received. According to DW 1 it was also not certain whether the Defendant had ordered for the goods.
 18. DW 1 explained to the Court that an official order was made through an LPO book that was issued to the supplier after receipt of quotations from them. Further, the manager in charge of the Defendant would approve the quotation and then issue an order. He further explained that the order would be signed by him and any one of the directors.
 19. It was his testimony that duly signed LPOs would be issued to the supplier with instructions to supply either to the site or to a store at the Defendant's head office. Mr. Mwangi informed the Court that the site was near Nakumatt, Mombasa Road as they had a project with a company known as Home Oil.
 20. It was further DW 1's testimony that payment would be made if there was an order, an invoice and a delivery note. In this case, DW 1 informed the Court that the Plaintiff did not issue the Defendant with invoices but only sent a Statement of Accounts. He testified that the Plaintiff later sent the accountant with the invoices but there were no orders or proof of delivery.
 21. He referred the Court to invoice no. 53448 dated 7th June 2005, attached to the Plaintiff's documents and pointed out that the same did not have an order number. According to him, an order number would always be at the top of the invoice. Further, he pointed out that in the said invoice no delivery note number was quoted. It was his testimony that the Defendant did not pay for all those invoices due to the foregoing anomalies.
 22. On cross-examination, DW 1 confirmed that all supplies were made against a specific order and that payment was made if and when an order was issued. He also confirmed that there was no formal contract between the parties.
 23. He testified that after goods were supplied an invoice would follow and sometimes a statement of accounts though not on a regular basis. When referred to the letter dated 6th July 2004, he confirmed that he had written and signed the same. However he was not sure whether the letter had been delivered by post or by one of the Defendant's staff.
 24. He further testified that vide the letter dated 25th July 2005 the Defendant wrote to the Plaintiff asking for clarification with regard to some missing invoices. It was also his testimony that by a letter dated 21st October 2005 the Defendant asked for accommodation for time to make payment and to clarify issues.
 25. DW 1 confirmed that as financial controller, he signed all LPOs which had terms and conditions at the back. He testified that the said conditions were also applicable to sub contractors. He stated that it would be a surprise to him if some invoices were paid without LPOs.
 26. When he was referred by Counsel to Invoice no. 53778 he confirmed that the same had an order

quoted on it and that goods were received by the defendant. However he could not tell whether the invoice was ever paid and stated that he would be surprised if the same was never paid.

27. He was further referred to Invoice no. 538803 in which no order had been indicated. He did not know if there was an LPO with regard to the said invoice and whether it had been partly paid in 2007. According to him it was not possible for invoices without LPOs to be paid. He testified that the figure of Kshs. 741,953.10 paid by the Defendant was not arbitrary as they had reconciled accounts and reached that figure.

28. On re-examination, DW 1 pointed out that payments could be made by 'misposting' or mismatching in that, a cheque sent to pay a particular invoice would be used to pay another.

29. The parties filed their written submissions as directed by the Court.

ANALYSIS

30. The main issue for determination in this matter is whether the Plaintiff is entitled to its claim of to **Kshs. 2,763,087.90/=**.

31. It is the Defendant's submission that the Plaintiff was responsible for breach of the trading terms by supplying goods to the Defendant without receiving any order and further delivering the goods to the site without receiving such instructions. In view of the foregoing it is submitted that the Defendant is not indebted to the Plaintiff and that the Plaintiff should not be allowed to take advantage of its wrongful acts to enrich itself.

32. From the evidence on record, it has been established that there was no formal contract between the parties relating to the supply of goods. However, from the evidence given by both parties it seems that there were basic trading terms between them as regards the supply of the goods.

33. It was PW 1's testimony that goods would be ordered either through LPOs, on phone or by employees who would come and pick the goods. On the other hand DW 1 testified that duly signed LPOs would be issued to the supplier with instructions to supply either to the site or to a store at the Defendant's head office.

34. With regard to orders made on phone, it was PW 1's testimony that the calls would be made by a Mr. Chege, Mr. Hassan, Mr. Mukururi and any of them could sign the LPO from the Defendant's side. This was not disputed by the Defendant. However, it was DW 1's testimony that among the three he only knew Mr. Hassan.

35. It was further testified for the Defendant that payment would be made if there was an order, an invoice and a delivery note. However, on cross-examination, DW 1 testified that after goods were supplied an invoice would follow and sometimes a statement of accounts though not on a regular basis.

36. Nevertheless, during the hearing it was established that some invoices which had no LPOs had been paid by the Defendant. This was to the surprise of DW 1 whose testimony was that it was not possible for invoices to be paid without LPOs. From his testimony, DW 1 was also not certain whether or not all invoices were paid and whether or not they all had LPOs. It is therefore discernible that some goods were supplied without any written orders from the Defendant and some of the deliveries were paid for.

37. With regard to the delivery of goods, it was testified for the Plaintiff that after an order was made the Plaintiff would prepare delivery notes and after delivery was done invoices were prepared. It was further testified that the delivery notes were signed by the Defendant. Among the bundle of documents produced and explained to the Court by PW 1 in support of the Plaintiff's case were some signed delivery notes. The said delivery notes were not disputed by the Defendant.

38. However it was DW 1's testimony that the Defendant rejected the Plaintiff's claim save for **Kshs.741, 953/=** because they could not confirm if the goods had been received. According to DW 1 it was also not certain whether the Defendant had ordered for the goods. To this end, the Plaintiff has produced delivery notes which have not been disputed by the Defendant. It has also been established that some invoices without order numbers had been paid for. In that case it would be difficult to establish whether or not the goods were ordered for. It was also pointed out by DW 1 that payments could be made by 'misposting' or mismatching in that, a cheque sent to pay a particular invoice would be used to pay another. In the circumstances it would be difficult to ascertain what payments were made for which invoice or order.
39. To say the least, it is apparent that the said trading terms between the Plaintiff and the Defendant were not strictly adhered to. The same were not clear cut. In view of the fact that there was no formal contract, there is no basis for holding that the Plaintiff was in breach of any trading terms.
40. It seems to me that there were no water tight rules regarding procurement on the Defendant's part hence its present predicament. That notwithstanding, whatever anomalies might have occurred on the Defendant's part as regards the ordering and payment of the supplies is in my view an in-house issue. Therefore, the consequence should not be visited upon the Plaintiff. The least the defendant can do is to deal with the officers responsible for the said anomalies.
41. It is the Defendant's case that the Plaintiff's claim is either for goods that were neither ordered for nor delivered. However, the Plaintiff has produced LPOs and delivery notes for goods that were ordered for and delivered and yet were not paid for. The Plaintiff has also produced invoices due for payment although some invoices had no order numbers. However, as has been established earlier some invoices without order numbers had been paid.
42. In summary the Plaintiff has established that there are some payments due to it from the Defendant. In light of the foregoing, I find that the Plaintiff has proved its case on a balance of probability. I hereby enter judgment in favour of the Plaintiff in the following terms:-
- a. ***Kshs. 3,505,041/= being the amount outstanding on goods sold and delivered less Kshs. 741,953.10/= paid by the Defendant on admission.***
 - b. ***Costs of the suit***
 - c. ***Interest on (a) and (b) above at court rates.***

This is the Judgment of the Court.

DATED, READ AND DELIVERED AT NAIROBI THIS 5TH DAY OF DECEMBER 2013.

E. K. O. OGOLA

JUDGE

PRESENT:

No appearance for the Plaintiff

M/s Muthee holding brief for Okonji for the Defendant

Teresia – Court clerk