REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI LAW COURTS

Civil Case 331 of 2011

FINEJET LIMITED …….. PLAINTIFF

VERSUS

FIVE FORTY AVIATION LIMITED ……..…… DEFENDANT

R U L I N G

1. Before this Court is an Application brought by way of Notice of Motion dated 19 October 2011 for orders that the Defendant's Defence herein dated 5 September 2011 be struck out and that judgement be entered for the Plaintiff as prayed in the Plaint. The Application is based on the following grounds:

"a) The Defendant's defence is a sham amounting to mere denials and amounts to an abuse of the Court

process.

b) The claim is for a liquidated sum.

c) The claim is admitted.

d) This is a straight forward case of Sale of Goods in which the Defendant/Respondent has taken delivery of the goods but has blatantly declined to pay the price thereof.

e) The Goods were of a perishable nature to wit, jet fuel and the Respondent has taken delivery and consumed the same and is not in a position to return them.

f) The Plaintiff's business continues to suffer due to the delay occasioned by the Defendant's refusal to settle the amount owed to the Plaintiff.

g) It is in the interest of Justice and expeditious disposal of claims that the Orders herein be granted".

2. The Application is supported by the Affidavit of **JOHN KIMANI** who describes himself therein as the Managing Director and shareholder of the Plaintiff Company. It is sworn on the 19 October 2011. In his

said Affidavit, the deponent details that the Plaintiff supplied fuel products to the Defendant from December 2008 until June 2011. He maintained that the Defendant was indebted to the Plaintiff in the sum of US$ 656,304.49 as per Exhibit "JK-1" attached to his said Affidavit. Thereafter, the deponent detailed that the Defendant took the fuel after receipt of a price notification which it was sent, at the beginning of each month, by the Plaintiff. The Plaintiff then issued a fuel order and the fuel was supplied to the various airport/airfield venues by the Plaintiff's appointed supplier. The Plaintiff then detailed to the Defendant a daily supply update and sent an invoice each month. The Defendant made payments for fuel on a weekly basis.

3. The system worked well according to Mr. Kimani from December 2008 to May 2011 and the Defendant paid for all deliveries up to the end of May 2011. The deponent exhibited a series of e-mails evidencing, he maintained, the acknowledgement by the Defement of amounts that it owed for fuel and making appropriate instalment payments therefore. Further in June, the Defendant remitted 3 cheques to the Plaintiff totaling US$ 90,000 which were returned unpaid. The deponent then stated that the Defendant alleged that the Plaintiff had been overcharging the Defendant but in the work sheet supplied by the Defendant as regards such overcharging allegation, it did not include therein details of 542,977 litres of Jet A fuel supplied by the Plaintiff in June 2011 worth, according to the Plaintiff. US$507,833.53. It was the deponent's view that the Defendant making allegations of overcharging by the Plaintiff was an afterthought and a tactic employed and calculated to delay payment of the amount due. The deponent in concluding his Affidavit commented upon the extent of the amount owed and the loss which the Plaintiff's business would suffer if the US dollar exchange rate fluctuated as against the Kenya shilling. He also detailed that he had charged his own matrimonial home to H.F.C.K. to finance the Plaintiff's business operations.

4. The Defendant filed a Replying Affidavit dated 3 November 2011 sworn by one **DONALD EARLE SMITH** described therein as the Defendant's Chief Executive Officer. The deponent detailed that the Defendant was a well-known airline operating out of both the Jomo Kenyatta International and Wilson Airports, Nairobi. He stated that he knew Mr. John Kimani very well, having first made contact with him when he worked for Chevron who had sold its operations in Kenya. Mr. Smith stated that he had been approached by Mr. Kimani, when the latter was setting up the Plaintiff Company, to move the Defendant's fuel purchase business to the Plaintiff and he had only agreed to do so providing that the Plaintiff's prices for fuel supply were competitive. The deponent made reference to pricing of fuel products as per the international Platt's price tariff and the Defendant discovered that the Plaintiff was not using such a benchmark for pricing its products for sale to the Defendant. The deponent maintained that the Defendant had found that the Plaintiff, without informing the Defendant, had changed its mode of charging away from Platt's *"based to one in which they put a huge mark up"*. Upon query, Mr. Kimani had informed the deponent that the Plaintiff had never agreed that its pricing would be Platt's based and that its purchase of fuel from supplies was not based on Platt's pricing. The deponent stated that there were several e-mails to this end.

5. Thereafter, Mr. Smith commented paragraph by paragraph relating to the Affidavit in support of John Kimani. One of the more interesting comments that he made at paragraph 21 of his said Affidavit was that the Defendant had made its own calculation on what Mr. Smith believed that the Defendant ought to have been charged *"based on the agreement on pricing mode and have noted that it is the Plaintiff/Respondent who owes us money"*. He goes on to say that he has instructed the Defendant's Advocates on record to make a counterclaim in respect of such monies overpaid. However, there is no Amended Defence plus Counterclaim on the Court file and no application by the Defendant pending, for leave to amend. Further, that calculation has not been exhibited to the Replying Affidavit and this Court is thus totally in the dark as to this aspect of the Defendant's Defence (see post).

6. It is apparent to this Court that in both the Affidavit in Support of the Application and in the Replying Affidavit, the deponents thereto are relying upon the various exchanges of E-mails as between the parties to exemplify what was the agreement between the parties so long as pricing for the fuel products is concerned. Further and as to be expected, the Affidavit in support details that the Defences filed herein is a sham while the deponent to the Replying Affidavit heartily denies that the same amounts to a mere denial and says that it is backed by documents. He maintained that the Plaintiff's claim is full of non-

disclosures and is based on a clear breach of agreement.

7. Mr. John Kimani swore a Further Affidavit dated 18 November 2011 and filed herein on 21 November 2011. That Affidavit only annexed an exhibit being a Certificate under **Section 106 B (4)** of the *Evidence Act* as to the e-mails and electronic documents contained in the Plaintiff's list and bundle of documents dated 29 July 2011.

8. The Plaintiff filed its submissions dated 18 November 2011 on 21 November 2011. Its first complaint was that the Defence filed was a *"sham"* amounting to mere denials. The goods were of a perishable nature being Jet A1 fuel which the Defendant has consumed and is not in a position to return the same, hence the claim being for the liquidated sum of US$ 656,306.49. The Plaintiff maintained that the sum claimed was sufficiently large to effect the Plaintiff's business and thus it was in the interests of justice that the Application be heard and determined expeditiously. The Plaintiff then drew this Court's attention to a number of paragraphs in the Replying Affidavit of **Donald Earle Smith** which it felt were indicative of the Defendant ordering and accepting the fuel and the prices therefore. More particularly, the Plaintiff dwelt upon paragraph 23 of the Replying Affidavit where the deponent had stated that:

"The only issue has been the silent departure from the mode of pricing".

The Plaintiff pointed out that before the fuel was supplied to the Defendant, on a month to month basis, the applicable prices therefore would be supplied to the Defendant thus the issue of *"silent departure"* and *"no notice"*, could not arise. The Defendant knew what price it was going to pay before it placed its order. The Plaintiff emphasized that there was no agreement between the parties as to the application of Platt's rates. Access to Platt's rates was easy, such were available through the Internet on a daily basis but the Plaintiff pointed out that there were various options and variations that could be applied. Then the Plaintiff asked, what was the differential or formula that applied to the Contract between the Plaintiff and the Defendant? The deponent to the Replying Affidavit had propounded at paragraph 4 of his witness statement that the agreed differential was 19 (U.S.) cents per gallon.

9. Turning to the law, the Plaintiff submitted that for a matter to go to full trial, there must be a triable issue that is bona fide. I was referred to **Kundanlal Restaurant vs. Devshi & Co. Ltd.** [1952] EA 77 following the Court of Appeal finding in **Souza Figuerado & Co. vs. Morning Hotel** [1959] EA 425. The Plaintiff submitted that denials and averments of the Defendant in this suit are not bona fide. I was also referred to the case of **Postal Corporation of Kenya vs. Inamdar & 2 Others** 1 KLR 365 cited with approval in **Moi University vs. Vishra Builders Ltd.** *Civil Appeal No. 292 of 2004*:

"The law is now well settled that if the Defence filed by a Defendant raises even one bona fide triable issue then the Defendant must be given to defend".

In the Plaintiff's view the issue must be bona fide and the Defendant's Defence does not raise such. Thereafter and to emphasize the point as to the raising of single triable issue, the Plaintiff referred me to the case of the **Co-operative Merchant Bank of Kenya Ltd. vs. Benson w. K. Muigai** – *HCCC No. 781 of 2001* (unreported) quoting extensively from the same.

10. I was also referred by the Plaintiff to **Section 262** of the *Sale of Goods* which reads:

"A thing is deemed to have been done in good faith within the meaning of this Act when it is in fact done honestly whether it be done negligently or not".

The Plaintiff submitted that in determining this Application, I would have to decide which of the Plaintiff and the Defendant, acted in good faith and honestly in their dealings. The Plaintiff submitted that the Court should look at the conduct of the Defendant in June 2011. It maintained that the Defendant was asking for a reduction of fuel prices in June 2011. If the Plaintiff did not agree to the same, the Defendant threatened to move to other supplies not in the Plaintiff's view because of the non-application of the Platt's rates but because the Plaintiff was withholding the credit facility. Finally, the Plaintiff referred this Court to **Section 49 (1)** of the *Sale of Goods Act* where simply expressed, in a contract of sale where the

property in the goods had passed to the buyer, the seller may maintain an action for the price of the goods where the buyer has neglected or refused to pay for the goods. The Plaintiff detailed that this was its position in this case and asked me to allow its summary judgement Application as prayed.

11. The Defendant's submissions no far as the Application is concerned are dated and filed on 5 December 2011. After reciting the facts of the case as put forward by both sides, the Defendant listed what it thought were the issues for the Court to decide upon in relation to the Application. Theses issue are as follows:

- *Whether the defendant has a reasonable defence to the claim that raises triable issues?*
- *Whether the defendant's claim is a mere deniel and a sham?*
- *Whether the claim has been admitted?*
- *Whether the issues raised in the replying affidavit are made in bad faith and are lies and intended to deceive the court?*
- *Whether the plaintiff has raised a case that would warrant judgment to entered for it.*

As regards the first issue the Defendant narrowed it down thus:

"whether the plaintiff and the defendant had a contract for the supply of fuel in which it was agreed that the prevailing prices on the supply would be 16 cag over and above the prevailing Platts indexed prices".

What confused me slightly was the subsequent submission by the Defendant as regards an e-mail dated 25 November 2009 from Don Smith of the Defendant company ostensibly sent to John Kimani of the Plaintiff company which the Plaintiff has maintained is a forgery and manufactured by way of defence to this Application thus setting-up according to the Defendant. This, the Defendant maintains becomes the first triable issues in this matter.

12. The Defendant detailed that next triable issue as being:

"Whether the Plaintiff and the Defendant had dealings before they entered into the contract of supply where the Plaintiff would provide prices based on Platts which then formed the basis for pricing the supply".

Further the Defendant then identified three other issues for determination:

(a) What was the formulae of determining the price of fuel supplied to the defendant?

(b) Was the plaintiff in the agreement or contract of supply the sole determinant of what price to charge for the fuel?

(c) Whether the plaintiff would be unjustly enriching itself if it were to be given judgement on the amounts it claims?

The Defendant then pointed to the filing by the Plaintiff of its Reply to the Defence stating that if there had been no triable issues as the Plaintiff had submitted, there would have been no need to file a Reply to the Defence.

13. In reply to the Plaintiff's submissions that the Defence was a sham, apart from the issues listed above as per the Defendant, the further 2 issues to which the Plaintiff had responded was the communication and the formulae for determining fuel prices and the whole question of overcharging for the fuel supplied. The Defendant also denied that the Defendant had admitted the Plaintiff's claim as had been suggested. According to the Defendant, no admission was made by it within the Pleadings or in correspondence. As regards the Plaintiff's submission that the Defendant had acted in bad faith, it maintained that it was for the Plaintiff to say how the Replying Affidavit is deceptive and how it is made in bad faith. In the Defendant's opinion, such cannot be proved without viva voce evidence taken at a full

hearing of the suit in due course.

14. The Defendant's further submissions dwelt upon the Plaintiff's assertions as regards fuel prices being monitored by all in the aviation industry and that 40% of costs in the industry amounted to fuel costs (being evidence put in by way of submissions). The Defendant maintained that the whole issue of the price of the goods (fuel) supplied was a triable issue. To this end, I found paragraphs 8.7, 8.8 and 8.9 of the Defendant's submission on the point instructive. Those paragraphs read

"8.7 The issue in this matter is not a question of prevailing prices. It is a question whether those prevailing prices were the prices agreed by the parties. There is evidence that the parties had agreed that the prices would be Platt's based and simply being informed of prevailing prices does not mean that the prices were agreed. The issue of price remains an issue so long as they were not Platt's based.

8.8. The issue of which Platt's was to be used would be an issue at trial since it is the plaintiff who agreed that it would supply on prices based on Platt's. The prevailing Platt's would definitely depend on where the Kenya market is supplied from and whether the plaintiff purchased from Total or one of the big importers. The email from Total Kenya speaks for itself.

8.9. The submission that there is no agreement between the parties whatsoever that the parties would apply the so called Platt's rates, is contradicted by the communication between the parties shown in the emails and also contradicts their own submissions as shown above".

15. The Defendant concluded its submissions by referring this Court to its List of Authorities dated and filed on 9 November 2011 but more particularly on the case of **Mpaka road Development Ltd. vs. Kana** [2004] Vol. EALR 161 as per Ringera J. What I was unable to understand from the Defendant's submissions was that, apart from the authorities it relied upon annexed its pages 1-53, it also annexed at pages 54 to 74 copies of e-mail and other correspondences, as between the Defendants and Total Kenya Ltd. I can only assume that such was omitted a mistake, this Court having directed that clearer copies of such correspondence should be filed by way of Supplementary Affidavit which did, in fact, happen.

16. The law as regards the granting of an application for summary judgement is well settled. Indeed, both Plaintiff and Defendant herein referred me to many of the same cases – **Moi University vs. Vishua Builders Ltd**, **Patel vs. Cargo Handling Services Ltd**, **Postal Corporation of Kenya vs. Inamdar & 2 Others**, **Souza Figuerado vs. Moovings Hotel and Kundanlal Restaurant vs. Devshi & Co.** (all supra). Simply put, the principle upon which the Court acts is that:

"Where the defendant can show by affidavit that there is a bona fide triable issue, he is to be allowed to defend as to that issue without condition".

Jacobs vs. Booth's Distilleny Co. [1901] 85 L.T. 262 H. L. However, in **Butchery Limited v. Samson Musila Nduva** – *Civil Appeal No. 35 of 1997,* as cited with approval in the **Moi University** case, the Court of Appeal commented that:

"If a bona fide triable issue is raised the defendant must be given unconditional leave to defend but not so in a case in which the Court feels justified in thinking that the defences raised are a sham".

17. The Plaint as filed herein prays for the liquidated amount of US$ 656,304.49. This amount, the Plaintiff claims is for fuel supplied to the Defendant which the latter has not paid for. Such supply involves fuel supplied and utilized in airfields/airports all over Kenya, Uganda and indeed Southern Sudan – even in remote places like Lokichoggio and Wajir.

18. I have perused the Defence as filed by the Defendant herein on the 6 September 2011. I have asked myself just what triable issues has it set up? At paragraph 3, the Defendant merely denied that it owed the Plaintiff the sum of US$656,304.49 and put the Plaintiff to strict proof thereof. However, the Defendant did admit that the Plaintiff supplied it with fuel from time to time during a period of time. However, there

was no admission in respect of the amount owed.

19. At paragraph 4 of the Plaint and referring back to paragraph 3, the Defendant admitted that it entered into a fuel supply contract with the Plaintiff arrived at through *"various correspondences"*. The Defendant maintained that it had been agreed between the parties that:

"the price of the fuel would be based on Platt's prices with a small differential which was always agreed on consultation before issuance of any invoice".

Further at paragraph 5, the Defendant maintained that the practice of supplying, pricing and invoicing was adhered to until sometime (unspecified) that the Defendant realized that the invoices being generated by the Plaintiff were in breach of the pricing mode and that the Plaintiff had departed from the prices being Platt based. The Defendant then maintained that it was being overcharged and that its account with the Plaintiff was in credit. The Defendant averred that it issued cheques to the Plaintiff which it stopped, once it realized its account was in credit. Apart from the above, the Defence contained a general denial of liability, which to my mind, did not amount to any sort of triable issue.

20. The copy documentation and correspondence exhibited by both Plaintiff and Defendant alike is voluminous. However, I have carefully perused the e-mail correspondence passing between Mr. Kimani of the Plaintiff Company and Mr. Smith of the Defendant Company throughout the time when the Plaintiff agreed to supply fuel to the Defendant. The earliest E-mail exhibited is from Mr. Smith to Mr. Kimani dated 25 November 2009 which reads:

"Further to our meeting I confirm that Finejet will supply Fly 540 Kenya with fuel. As agreed it will be at the same differential of 19 cag as we currently get. I'll tell the guys to switch asap".

Prior to that there is an email from Mr. Kimani of the Plaintiff Company to Mr. Macharia for the Defendant Company which reads:

"Unlike our previous supplier, the current one does not post formulae prices; they provide fully built up figures for all locations. For small volume locations (EDL & LKG) prices are not directly linked to the international market, they are based on the cost of the actual stocks held. For the bigger locations, we are able to monitor actual movements month on month using Platt's tables to ensure they remain very competitive. The increase from October to November 09 was $0.04/Ltr as illustrated on row 44 of the Platt's Index tables attached".

From that e-mail it seems obvious that in its pricing for high volume locations, the Plaintiff did take into account international fuel prices based on Platt's tables. Such are easily ascertained as per the Internet but as between Plaintiff and Defendant, as I understand it, the pricing of the fuel supplied was not conditional upon the Platt's tables.

21. Over the period of time that the Plaintiff was supplying fuel to the Defendant, it was apparent that the latter's executives were keeping eyes and ears open as to the price goings-on in the market. In the e-mail correspondence exhibited by both parties, there is evidence of price ascertainment by the Defendant from Shell, Oil Libya and Total. Such usually gave rise to an E-mail from Mr. Smith to Mr. Kimani querying why the Plaintiff's prices were higher than these 3 major players in the market. What I perceive led to the termination of the agreement between Plaintiff and Defendant were discussions that commenced in March 2011 as between Mr. Kimani and Mr. Rob Davidson of the Defendant Company. It appears that the Plaintiff was obtaining its fuel supplies for onward transmission to its customers including the Defendant from suppliers importing such fuel into Kenya. Mr. Kimani's email to Mr. Davidson of 9 March 2011 is clear:

"Following our discussion yesterday, I have checked and confirmed we indeed got a high cost per litre genuinely from our supplier, based on Platt's index used, exchange rate and their replacement costs between Feb and March 2011".

Mr. Kimani's position as regards Platt's is more clearly detailed in paragraph 5 of his e-mail to Mr. Smith and Mr. Davidson of the Defendant Company dated 21 June 2011:

"5) For the last 3 years when the relationship between Fly 540 and Finejet has been established, we never discussed Platt's based prices with anyone as we do not import fuel into the country. Our prices have always been discussed as in the above mentioned points".

It appears that E-mail was in response to Mr. Smith's of 16 June 2011. The 2nd paragraph of that letter is indicative of the Defendant's position:

"Re prices provide me with platts based prices from inception. We were always platts based. Let us see that same margin was kept as agreed at the start. But rate we feel you have not kept to the agreed ratio and overcharged us".

In turn that e-mail seems to have been prompted by a cheaper Jet A1 offer from Oil Libya. The e-mail correspondence thereafter became more and more acrimonious with the Defendant obviously resorting to sounding out the fuel market as it exhibited an e-mail dated 30 June 2011 from one Alexis Vovk which reads:

"Don

Fine jet is on Platts + Premium at JKIA and Wilson. Please keep your source secret".

It seems that the Defendant then decided that the relationship with the Plaintiff must come to an end.

22. I have found it necessary to recount the above sequence of events as it has helped me to ascertain just whether there are triable issues raised by the Defence as regards the Platt's tables being a factor in the pricing between the Plaintiff and the Defendant. I have also considered the Defendant's submissions in relation to the various issues that it has raised therein. Are they bone fide? I do not accept the Defendant's submission that the fact that the Plaintiff has filed a Reply to the Defence in relation to the price of fuel being determined or based on Platt's prices, evidences that such is an issue at least for the Plaintiff. All that the Reply does is to deny that such was never a basis for pricing of fuel supplies as between Plaintiff and Defendant.

23. The plain fact is that the Plaintiff has supplied fuel to the Defendant for which it has not been paid. The Defendant has had plenty of opportunity to obtain Platt's pricing tables itself for the period in which fuel was supplied. Such would have allowed the Defendant to make the relevant calculations and work out what it claims it has overpaid and file a counterclaim therefore. Indeed, as per paragraph 21 of the Replying Affidavit, Mr. Smith deponed to the fact that the Defendant had made its own calculation as to overpayment. It has failed to reveal this to date. It has not even made application to this Court for leave so to do. Consequently, I am of the opinion that the Defence raised in this regard is a sham. Accordingly, I allow the Plaintiff's Notice of Motion dated 19 October 2011 and enter Judgement for the Plaintiff against the Defendant as prayed in the Amended Plaint dated 5 August 2011, with costs.

DATED and DELIVERED at NAIROBI this 14th day of February 2012.

J. B. HAVELOCK
JUDGE