**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL CASE NO.586 OF 1995**

**RASHMIKABNT MEGHJI SHAHA t/a RAHA WHOLESALERS……...….PLAINTIFF**

**VERSUS**

**SOUTH NYANZA SUGAR COMPANY LIMITED.....DEFENDANT**

**JUDGMENT**

The facts in this dispute are fairly straight forward and largely uncontroverted. For instance, it is not disputed that the parties' relationship dates back to 1993. The defendant, a sugar manufacturer and dealer and the plaintiff a wholesaler had a business arrangement whereby the latter would purchase sugar in large quantities from the plaintiff.

It was in the course of such business that the plaintiff placed two orders on two separate dates for the supply of sugar. The two orders are the subject of this dispute. The existing practice between the parties was that there would be an oral order by way of a telephone call followed by a written order, stating the quantity of sugar and forwarding the cheque for payment of the bags ordered. Upon receipt of payment, the defendant would issue a receipt to the plaintiff.

The defendant upon receipt of the order would internally issue a dispatch schedule to the relevant section or department. Again, it was a matter of practice that the plaintiff, after fully paying for the sugar ordered, would not collect them at once.

The plaintiff would provide his own transport as and when he wished. Starting with first transaction, the plaintiff through his General Manager made a call to the defendant's Financial Controller on 20th March, 1995 and placed an order for the supply of 10,000 bags of 100 kg each of white sugar. An order as explained earlier was dispatched with a cheque in favour of the defendant in the sum of Kshs.32,500,000/=, the price per bag being Khs.3,250/=.

It is not denied that the defendant having supplied 5040 bags out of the 10,000 bags notified the plaintiff of a ministerial directive increasing the price of 100kg bag of sugar from 3,250/- to Kshs.3,400/=. The defendant, in light of that development advised the plaintiff to make an election to accept the changes in price by taking delivery of the remaining 4960 and paying additional Kshs.150/= per bag or Kshs.744,000/= for 4960 bags or accept what had so far been delivered in full and final settlement.

The plaintiff rejected both options insisting on the full supply on the terms agreed earlier. The supply, however resumed and according to the plaintiff, 9,581 out of 10,000 bags were supplied leaving a balance of 419 bags which remained undelivered at the time this action was instituted.

On the first contract of 20th March, 1995 the plaintiff claims that as a result of the defendant's failure to supply 419 bags, he lost Kshs.1,361,750/= being the equivalent value of 419 bags at Kshs.3,250/=. In addition, he claims Kshs.1,550,300/= in loss of profit at the rate of Kshs.450/= per bag.

The second contract was on 7th April, 1995 when, in accordance with the practice explained earlier, an order was placed on telephone to the defendant to supply 7000 bags of sugar at Kshs.3,400/=, the new price. A written order together with a cheque for the entire consignment in the sum of Kshs.23,800,000/= was dispatched. The defendant issued a receipt and the relevant section directed by an internal memo to dispatch to the plaintiff 7000 bags. However, without any apparent reason, on 28th April, 1995, 21 days later, the defendant returned the cheque of Kshs.23,800,000/= to the plaintiff.

The defendant's witnesses gave varied reasons for this action which will become clear later on. Suffice to state that despite protests from the plaintiff, the defendant was undeterred and stood by its decision.

In respect of this transaction, the plaintiff claims loss of profit at the rate Kshs.300/= per bag for 7,000 bags translating to Kshs.2,100,000/=. The plaintiff also seeks costs of the suit with interest from the date of filing this suit together with VAT at 16% per annum as well as compound interest at the rate of 32% per annum or at commercial rate or such other rate as the court may grant.

The defendant's case may be briefly stated thus. On the first transaction it was the defendant's position that due to a ministerial directive issued on 10th April, 1995, increasing the price of 100kg bag of sugar to Kshs.3,400/=, the defendant was unable to supply the plaintiff at the original price of Kshs.3,250/=. In order to accommodate the plaintiff on account of this development and considering that he had paid fully on the original price, the defendant argued that 219 and not 419 bags as alleged were not collected was subsumed in the new price. In other words, it was the defendant's contention that the plaintiff collected everything that his Kshs.32,500,000/= could buy at the new rates and therefore had no claim against the defendant.

On the second transaction, the defendant while conceding receiving a cheque of Kshs.23,800,000/= and issuing a receipt, insisted that nothing stopped them from doing so because there was no contract. They further explained that the parent Ministry had issued a directive increasing the price of 100kg bag of sugar from Kshs.3,400/= to Kshs.3,500/= hence the defendant could not sell at the earlier agreed price without incurring losses. It was the defendant's further contention that although they had received the plaintiff's cheque for the supply of 7000 bags of sugar, that contract was frustrated by the intervention of the action of the parent Ministry to increase the price before the delivery to the plaintiff. The defendant has, in addition argued that the plaintiff ought to have mitigated his losses.

The parties called two witnesses each. The evidence on behalf of the plaintiff in respect of the two contracts may be summarized as follows:

i) that the parties had a buyer/seller relationship with specific trade practices;

ii) that the plaintiff placed orders for the supply of sugar in accordance with those practices;

iii) the plaintiff complied with the conditions precedent and in respect of the first transaction, the defendants partially met their part of the bargain;

iv) the defendant completely failed to supply the goods in the second transaction and reneged on the agreed terms;

v) as a result of those breaches, the defendant failed, in the case of the first transaction to supply 419 bags of sugar and in the second transaction the entire consignment was not supplied;

vi) consequently, the plaintiff suffered loss and damages in terms of loss of business and breach of contract.

The defendant's case at the trial was that:

i) indeed there was a seller/buyer relationship between the parties herein;

ii) the terms of their relationship were dictated by market forces and directives from the Government, the defendant being a corporation;

iii) during the pendency of supply in the two transactions, the Government through the relevant parent Ministry issued directives increasing the prices from what was initially agreed, which changes were duly communicated to the plaintiff, who in turn rejected the proposal to top up and take full delivery;

iv) as a consequence of the changes in price and the refusal of the plaintiff to top up the difference was 219 bags;

v) the defendant was variously advised not to bow to the threats of a law suit by the plaintiff as the latter would not dare do that and expect to continue trading with the Government;

vi) when the plaintiff carried his threat he was blacklisted and the defendant's staff instructed not to supply sugar to him;

vii) with regard to the second transaction, there was no contract between the two parties hence the action of the defendant to return the cheque.

I have duly considered the pleadings, evidence submissions and authorities in this matter. Whereas I noted earlier that the issues in this dispute are largely uncontroverted, the following issues, however, are in contention, namely:

i) whether the defendant was justified in not supplying the full order in the two transaction;

ii) whether the defendant failed to supply 219 or 419 bags as a result of price differential;

iii) whether the contracts were frustrated or whether there was a breach of contract by the defendant;

iv) whether indeed there was any contract in respect of the second transaction;

v) whether or not the property in the goods had passed to the plaintiff;

vi) whether the plaintiff is entitled to the reliefs sought or whether he failed to take steps to mitigate his loss;

vii) whether the plaintiff is entitled to compound interest.

It is conceded by the defendant that it was unable to supply, in the first transaction the agreed 10,000 bags at the agreed price of Kshs.3,250/= due to an increase of Khs.150,/= per bag. There is also no dispute that by the time that increase was effected, the plaintiff had paid fully for 10,000 bags at the rate prevailing at the time of the order.

A contract of sale of goods in terms of **Section 3(1)** of the **Sale of Goods Act**,

**"…….is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration called the price."**

At the time the defendant purported to increase the price there was a contract whose terms had been agreed by the parties and indeed the plaintiff was taking delivery. Any subsequent price changes could not affect the 10,000 bags already purchased.

As was correctly conceded by the defendant's witness, Jackton Ooko Owuor in his evidence:

**"On 20th March, 1995, the defendant sold 10,000 bags and if the plaintiff had transport, he could have collected all the 10,000 bags."**

The price of the good had been fixed and agreed upon by the parties and no third party not even the Government had capacity to vary that contract. The defendant therefore could not vary the agreed price of the Sugar without breaching the contract and hence was not justified in doing so.

At the time the defendant purported to withhold part of the sugar sold, the property in them had already passed to the plaintiff, the sale being for ascertained and specific goods and the intention of the partied being that the property would pass upon payment of the full purchase price.

**Section 20** of the **Sale of Goods Act** provides that:

**"Unless a different intention appears, the following rules apply for ascertaining intention of the parties as to the time at which the property in the goods is to pass to the buyer: -**

**a) where there is an unconditional contract for the sale of specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made and it is immaterial whether the time of payment or the time of delivery or both be postponed;**

**b) ……**
**c) ……..."**

The fact that the goods remained with the defendant as the plaintiff took piecemeal delivery did not divest the plaintiff of their ownership. Indeed **Section 30** of the **Act** does provide that whether it is the buyer to take possession of the goods or the seller to send them to the buyer is a question which depends on the arrangement of the parties, express or implied.

Having found that the defendant was not justified to withhold part of the plaintiff's order, the next question is how much of the order was withheld. The plaintiff insists that 419 bags were not supplied while the defendant puts the number at 219. The transaction was recorded in a dispatch schedule. It reflected the date of issue, the amount of sugar (in bags) issued, the balance after issue and the signature of the recording staff. The balance on 7th April, 1995 is shown as 4960 bags.

However, the balance brought forward reflected on 2nd May, 1995 which is the next date after the last entry of 7th April, 1995 is shown as 4541. Logically, the balance brought forward from the last issue on 7th April, 1995 ought to have been 4960. The difference is therefore 419 and not 219 bags and so I find.

Turning to the second transaction, once again it is common ground that there was a written contract preceded with an oral order. The plaintiff made full payment for the order in the sum of Kshs.23,800,000/= representing the cost of 7000 bags of 100kg sugar at Kshs.3400/= per bag. The cheque was issued on 7th April, 1995. It is not clear when exactly it was returned.

Learned counsel for the plaintiff submitted that it was returned to the plaintiff after three months. That assertion cannot be correct considering that on 28th April, 1995, the plaintiff wrote to the defendant complaining over the returned cheque.

The defendant's witnesses have given varied reasons why the cheque was returned and goods not supplied. According to Jackton Ooko Owuor, the defendant was unable to supply the goods at the earlier agreed price due to a price hike by the parent Ministry. It is not clear what form the directive on the price hike took.

It is said it was by a gazette notice (No.156 of 1995). It was suggested that it was by way of telephone call

and finally that there was a meeting. The amendment in the Kenya Gazette Notice No.156 of 1995 has no relevance to the price of sugar. The amendment was only meant to add to the functions of the Kenya Sugar Authority - that of regulating the manufacture, distribution, storage and marketing sugar and its by-products and also to regulate the quantity and quality of local and imported sugar.

No gazette notice or decision of any kind from any quarter was produced to prove that indeed there was a legitimate price increase of sugar to warrant the defendant's action of returning the cheque. The defendant has pleaded frustration of contract and at the same time argued that there was no contract in the first place.

**Section 5** of the **Sale of Goods Act** provides that:

**"Subject to the provisions of this Act and of any Act in that behalf, a contract of sale may be made in writing (either with or without seal) or by word of mouth or partly in writing and partly by word of mouth, or may be implied from the conduct of the parties."**

(Emphasis supplied)

There is evidence that **P.W.1, Nalin Meghji** called on behalf of the plaintiff and talked to D.P. Alderdice, the defendant's Financial Controller on 7th April, 1999 and agreed on the terms of the supply. That conversation was followed by a formal order and the cheque for the supply of the entire consignment. On the same day, the defendant issued a receipt and by way of an internal memo authorized the dispatch of 7000 bags of sugar to the plaintiff. There was a contract by word of mouth, in writing and by conduct of the parties whereby the defendant transferred or agreed to transfer 7000 bags of sugar to the defendant for a money consideration in the sum of Kshs.23,800,000/=.

As stated earlier, the parties had developed a trade practice and usage which took the pattern employed in the second transaction. I find that there was a valid and enforceable contract in respect of the second transaction. Was it frustrated?

I have in the previous paragraphs reached a conclusion that there was no decision that would validly vary the obligations and duties of parties to a contract. In **Kenya Commercial Finance Company Limited** V. **Ngeny & Another** (2002) 1 KLR 106 where the High Court found that failure to service a loan due to failure of harvest as a result of the *El Nino* rains was a ground to avoid a contract on the ground of frustration was held, on appeal that the finding was in error as it amounted to the court re-writing the contract for the parties. The court quoted from **WORDS AND PHRASES LEGALLY DEFINED** Vol. 2 at page 296 that:

**"The doctrine of frustration operates to excuse from further performance of a contract where it appears from the nature of the contract and the surrounding circumstances that the parties have contracted on the basis that some fundamental thing or state of things will continue to exist or that some particular persons will continue to be available, or that some future event which forms the basis of the contract will take place and before breach, an event in relation to the matter stipulated (above) renders performance impossible or only possible in a very different way from that contemplated but without default of either party."**

(Emphasis supplied)

What happened in the two transactions cannot be stretched to constitute frustration of contract. The defendant took the step to vary the terms of the contract between them and the plaintiff following some meeting in Nairobi (See D exhibit 2 – a letter dated 3rd May, 1995 to the Permanent Secretary, Ministry of Agriculture, Livestock Development & Marketing).

In that aforesaid letter, he sought to know what to do with the plaintiff's order which was placed and partly performed by the defendant before the new policy on the price. The advice the plaintiff received from the Permanent Secretary and the Chief Executive Kenya Sugar Authority was a display of extreme

arrogance. In one of the replies, the Permanent Secretary wrote:

**"The Attorney general has advised us that there is very little possibility of some of these buyers taking you to court…… At any rate, it is very difficult for a buyer to take you to court and expect to continue doing business with you. Even the Mumias Traders who were very hot in threatening to take the company to court, none of them has done so. Some of these traders have been buying sugar for many years and it has become their sole business. It is therefore not easy for some of these traders to go as far as taking you to court knowing well that such a decision is definitely going to affect their business……"**

Clearly, these arrogant statements fortified the defendant in their resolve not to honour an existing contract. Because the plaintiff did not relent even in the face of those threats, he was blacklisted. With the blacklisting, no sugar miller in the country was ready to trade with plaintiff. It was impossible for him to mitigate losses.

Is the plaintiff entitled to the relief sought? In the pleadings, the plaintiff has sought an award of Kshs.3,650,300/= made up as follows:

i) a refund of the value of 419 bags = Kshs.1,361,750/=;

ii) loss of business at Kshs.450 per bag for 419 bags = Kshs.188,550./=;

iii) special damages – Loss of profit at 300/= per bag for 7000 bags = Kshs.2,100,000/=.

I have early found that indeed the defendant withheld 419 bags whose value was kshs.1,361,750/=. It follows that the plaintiff was denied profit which would have accrued had the 419 bags supplied. However, the plaintiff led no evidence to explain how kshs.450/= per bag was arrived at. Similarly, no evidence was led on how Kshs.300/= profit per bag was arrived at.

In terms of **Section 51(1) (2)** of the **Sale of Goods Act,** the plaintiff can maintain an action for damages the measure of which is the estimated loss directly and naturally resulting in the ordinary course of events, from the seller's breach of contract. It is for the plaintiff and not the court to obtain and prove those estimates.

I award Kshs.1,361,750/= being the value of 419 bags, Kshs.1,000,000/= being reasonable loss for breach of contract on the two contracts translating thus:

Kshs.1,361,750
Kshs.1,000,000
**Total 2,361,750**

I also award interest at court rate on the above sum from the date of filing this suit until payment in full, together with costs of the suit.

**Dated, Signed and Delivered at Nakuru this 9th day of March, 2012.**

**W. OUKO**
**JUDGE**