



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA
AT KISII**

CIVIL CASE NO. 146 OF 2005

KENYA SEED COMPANY LIMITED.....PLAINTIFF

-VERSUS-

DAKIANGA DISTRIBUTORS (K) LTD.....DEFENDANT

JUDGMENT

This suit was initially filed at Nairobi Milimani Commercial Courts on or about 18th April, 2005. However on or about 26th September, 2005 by the consent of the parties, the suit was transferred to this court for hearing and final determination. In the suit, the plaintiff claims as against the defendant a liquidated sum of Kshs. 12,104,180/= on account of goods it sold and delivered to the defendant at its request. The goods sold and delivered as aforesaid were seeds. However the defendant failed and or neglected to pay for the same despite repeated requests and demands by the plaintiff. Alternatively the plaintiff claimed the aforesaid amount on the footing of six (6) cheques drawn by the defendant on its bank account number 0207994400 at National Bank of Kenya Limited, Kisii branch, in favour of the plaintiff in settlement of the debt and which cheques were returned unpaid with remarks “**code 63**” which in ordinary banking parlance means “**insufficient funds**” by reason of which notice of dishonour was dispensed with.

The defendant denied the plaintiff’s claim and contended that the cheques referred to were replaced with other cheques which were honoured on presentation to the bank, and further that it sought a set off in the sum of Kshs. 2,448,000/= paid to the plaintiff vide cheque dated 31st December, 2009 for a consignment of maize seeds which were however not supplied to the defendant by the plaintiff. Finally, the defendant admitted owing the plaintiff though a sum of Kshs. 1,211,935/= only, as an outstanding debt on that account.

The hearing of the suit commenced before me on 23rd September, 2010. The plaintiff through **Meshack Kiprop Sawe**, its accountant testified that the defendant was one of their agents with regard to the sell and distribution of their seeds at an agency price. Between 2004 and 2008 they sold and delivered to the defendant seeds worth Kshs.12,104,180/=. The defendant paid for those deliveries by cheques which were however dishonoured on presentation to the bank. In support of the claim, the witness tendered in evidence the delivery notes. In response to the defence that the cheques which had been dishonoured as aforesaid were replaced, the witness stated that having checked their records, they had concluded that those cheques were for particular deliveries separate from the amount being claimed. He stated for instance that the cheque for Kshs. 642,000/= was for a cash sale over the counter No. 312700, cheque for Kshs, 2,881,500/=, was in respect of cash sale No. 312833 and Kshs. 1,605,000/= was for a cash sale no. 315439 to **Ombega Enterprises**. He tendered in evidence documents in support of the above transactions. In the premises those cheques were not replacement cheques as claimed by the

defendant in its defence. He also denied that they had received a cheque for Kshs. 2,448,000/= but failed to supply to the defendant the maize seeds. The witness then tendered in evidence a bundle of documents showing the amounts in respect of which the dishonoured cheques were issued and also photocopies of the dishonoured cheques. He concluded his testimony by stating that since the lodging of the claim, the defendant had paid Kshs. 1,000,000/=. He therefore prayed for the judgment in the sum claimed in the plaint less Kshs. 1,000,000/= paid as aforesaid plus costs and interest.

Cross-examined by **Mr. Bosire**, learned counsel for the defendant he stated that the defendant had been doing business with them since 1991. There was no requirement that one pays a deposit before being appointed a distributor of their goods. He conceded though that bankers cheque numbers 100955 and 100929 for Kshs. 256,800/= and 465,800/= were not captured in their records. Referred to a cheque issued by **Ombega Enterprises**, he confirmed that based on the invoice, they had dealings with **Ombega Enterprises** but could not tell who had presented the cheque. He did not however rule out the possibility of **Ombega Enterprises** having made the payment on behalf of the defendant. He denied however that they had the habit of using the bankers cheques issued to them by the defendant to supply goods to other entities. He had no doubt at all that they supplied and the defendant received the goods over the counter. The counter transactions did not require signatures. Nonetheless they were also paid for by cheques. The documents in support of the plaintiff's claim were for the period 2004-2005. The plaintiff stopped dealing with the defendant in January, 2005. All payments received from the defendant were reflected in their summary.

That then marked the close of the plaintiff's case.

For the defence, **Charles Mageto**, a director of the defendant testified that they had, had dealings with the plaintiff. They used to distribute their seeds in Kisii, part of Kericho and the whole of South Nyanza. They would buy the plaintiff's seeds either by cash, cheques or bankers cheques. He conceded that in this case, they had issued cheques which had bounced and those were the cheques enumerated in the plaintiff's statement of claim. However, it was his testimony that those cheques were subsequently replaced with bankers and company cheques which were all honoured. The replacement cheques were:-

-Bankers cheque for Kshs. 1,605,000/= issued by Credit Bank, Kisii

- Cheque dated 11th January, 2005 in the sum of Kshs. 465,800/= issued by Credit Bank, Kisii.

-Cheque dated 11th January, 2005 in the sum of Kshs. 513,600/= issued by Credit Bank Kisii.

-Cheque dated 11th January, 2005 in the sum of Kshs. 430,000/= issued by KCB, Bomet.

-Cheque dated 11th January, 2005 in the sum of Kshs. 649,545/= issued by Credit Bank, Kisii

According to the defendant all the aforesaid cheques were not reflected in the plaintiff's statement of account, exhibit 3. He conceded however that a bankers cheque for Kshs. 770,000/= was reflected in the statement account as well as his cheque for Kshs. 1,000,000/=. Sometimes on 31st December, 2004, he issued a cheque for Kshs. 2,448,000/= for the purchase of seeds. Though the cheque was paid, the consignment of was however not delivered by the plaintiff to it. He concluded his testimony by conceding that the defendant owed the plaintiff a sum of Kshs. 1,211,935/= which it was ready and willing to pay. He tendered in evidence a bundle of the cheques that he had referred to in his evidence. Otherwise he prayed that the suit be dismissed.

Cross-examined by **Miss Kibicho**, learned counsel for the plaintiff, he stated that they stopped dealing with the plaintiff in 2005. They would order for the goods then pay for them either in cash or by cheque. The goods would either be delivered by the plaintiff or they would personally collect the same. The goods would be accompanied by delivery notes. They were not allowed to get goods on credit. The defendant always purchased the goods in its names. He conceded that with regard to the bundle of cheques he had tendered in evidence, he had not particularized them in the defence. He had not tendered in evidence the 3 cheques he had referred to in its defence. With regard to the payment of

cheques for goods which were not supplied, the witness stated that he complained of the anomaly through the plaintiff's Kisii branch but was instead referred to the plaintiff's Finance Director at its headquarters in Kitale. However the Finance Director insisted that he pays ½ of the outstanding debt before he could continue having business with them. Soon thereafter he was sued. He stated that the amounts claimed were all replaced by cheques. He conceded however that the three cheques listed in the defence were not replacement cheques but payments of the three other transactions. At this juncture the witness stated that he needed time to verify the position as the defendant had many transactions with the plaintiff in the past. He had nothing however to show that they were indeed replacement cheques.

That then marked the close of the defendant's case.

Parties thereafter agreed to file and exchange written submissions. This was subsequently done. I have carefully read and considered the written submissions.

What are the issues for determination in this case? I think the issues as framed by the defendant in its written submissions captures the picture. I will adopt the same in determining this suit. Those issues are:-

-Whether defendant issued replacement cheques in respect of its dishonoured cheques.

-Whether the defendant is indebted to the plaintiff as alleged in the plaint or at all and if so, the amount of the debt.

-Whether the plaintiff received a cheque for kshs. 2,448,000/= as alleged in the defence and if so whether it was in payment of goods which were never supplied entitling the defendant to a set –off.

-costs.

From the outset I must state that the defendant struck me as a person who has no respect and regard for truth whatsoever. When an issue did not suit him, he would deliberately feign ignorance. For instance under intense cross-examination by counsel for the plaintiff, he cracked and looked exasperated. He threw his hands in the air and remarked “...***I need time to verify the position since we had many transactions. I have nothing to show that they were replacement cheques.....***” He further conceded under cross-examination that “.....***these 3 cheques listed in the defence were not replacement cheques but payment of the three transactions.....***” In its defence, the defendant had categorically pleaded in paragraphs 5 thereof that the three cheques:-

-No. 006854 dated 9th December, 2004 for Kshs. 642,000/=

-No. 006911 dated 3rd January, 2005 for Kshs. 2,881,500/=

-Bankers cheque No. 100962 dated 18th January, 2005 for 1,605,000/= were replacement cheques. However in his evidence and under cross-examination it turns out and indeed he confirms that those payments were in respect of other transactions and moments later feigns ignorance in respect of the said cheques and prays for time to verify the position. However, he never followed up the request for verification. To my mind that request was made in jest and after he had been cornered in cross-examination and had no way out. This is not a witness whose evidence should be treated as credible. He was obviously out to deliberately mislead the court. If he can mislead the court on such mundane things as the purpose for which he issued those cheques, what else is he capable of misleading the court on?. However his only redemption came vide the evidence of PW1 when he conceded under cross-examination as well that the bankers cheque for Kshs. 256,800/= and 465,800/= had not been captured in its records as well as a cheque issued by **Ombega Enterprises**. He conceded that it was possible that **Ombega Enterprises** may have made the payments on behalf of the defendant. This was the plaintiff's case and it was its duty to counter such evidence. To my mind it did not discharge that burden successfully.

This suit rested really on reconciliation of accounts. If the plaintiff, defendant and their financial team had sat together and did a reconciliation of accounts, I do not think that it would have been necessary to file and prosecute this suit.

Finally, parties are bound by their pleadings. As already stated, the defendant claimed in its defence that it issued the 3 cheques in replacement of the dishonoured cheques. However during the trial, it tendered into evidence six additional cheques namely 011077, 100953, 100955,100 with a grant total of Kshs. 10,892,245/= as opposed to the total amount of Kshs. 5,128,500/= in replacement cheques pleaded in defence. Clearly this was a complete departure from its pleadings. Nor are they supported by the pleadings. I may even go further and state that the evidence led by the defendant on this aspect of the matter was completely at variance with its pleadings which is not permissible.

The plaintiff has in its submissions stated that the defendant did not even list these other cheques in its list of documents filed in court on 3rd November, 2007 nor did they form part of the statement of agreed issues filed in court on 19th July, 2007. I quite agree with the submission of the plaintiff that it is settled practice that parties make full discoveries prior to trial to make known to the opposing side the exact issues for determination to prevent surprise at the trial. The defendant in failing to make full discovery was engaging in the very mischief sought to be curbed under the rules on discovery. It is instructive that all these submissions by the plaintiff met with no response at all from the defendant in its written submissions. It can only be assumed that the defendant had no response to the same and therefore they reflected the correct position. However since the plaintiff did not object to that evidence being adduced and allowed the said cheques to be introduced in evidence and are therefore on record, this court cannot simply ignore or overlook them. They must be taken into account more so considering the contrasting evidence tendered on the same by both the plaintiff and defendant.

From the foregoing, it must be obvious that the answer to issues number one and two framed is that the cheques allegedly paid were not all replacement cheques. Some of them according to the defendant were for other transactions. Others were not pleaded in the defence nor were they captured during the discovery or in a list of agreed issues. In any event as at the time of filing the defence, the defendant only acknowledged three replacement cheques and denied owing the plaintiff any amount. With this additional cheques, what the defendant is then saying is that it overpaid the plaintiff. If that be the case, one would have expected a set-off and or counterclaim. However, in the light of the admission by PW1 that a bankers cheque No. 100955 dated 17th January, 2005 for Kshs. 256,800/= and another one 100929 for Kshs. 465,800/= was not captured in their records, I will give the benefit of doubt to the defendant and set off the total amount against what is claimed by the plaintiff. I will do the same with regard too to the payments made by **Ombega Enterprises** in the sum of Kshs. 1,605,000/= having regard to the evidence of PW1 on the same as well when he conceded that it was possible that **Ombega Enterprises** could have made that payment on behalf of the defendant. As a result of the foregoing I would hold that the defendant does not owe the plaintiff the sum of Kshs. 12,104,180/= as claimed in the plaint. Rather the plaintiff is owed Kshs. 9,776,580/= if the three payments aforesaid are taken into account.

It is common ground that the defendant paid to the plaintiff cheque number 006866 for the sum of Kshs. 2,448,000/=. According to the defendant, this payment was in respect of a consignment of seeds which were not delivered by the plaintiff. Accordingly it is entitled to set off against the amount claimed by the plaintiff. On the other hand, the plaintiff takes the view that the said payment was in respect a debt owed to the plaintiff since 2003. I have looked at the delivery note in respect of this transaction. I note that contrary to the submissions of the defendant it is possible that infact the maize seeds consignment was delivered. There is a signature of a person who received the consignment on behalf of the defendant though his name is not given. The defendant did admit in his evidence that some of the deliveries to it by the plaintiff would occasionally be acknowledged and signed for by his driver. The delivery note has even details of the motor vehicle that delivered the consignment, the date of dispatch, the waybill numbers and even the invoice date being 8th August, 2003. The plaintiff's position therefore that the payment of Kshs. 2,448,000/= was in respect of this transaction cannot be assailed. There was no suggestion by the defendant that the delivery note was a forgery. Further, if indeed the defendant had issued a cheque for goods which were never delivered, one would ordinarily have expected some sought of communication over the issue between the defendant and plaintiff considering the colossal sum involved at the time. A conscientious businessman would have contacted the plaintiff demanding the goods which he had paid for and not delivered. I did not hear the defendant say it undertook such an exercise. I am therefore satisfied on my scrutiny of the delivery notes that the sum of Kshs. 2,448,000/= was paid on account of

the debt arising from the delivery to the defendant of maize seeds by plaintiff made on 8th August, 2003 as stated by the plaintiff. Accordingly, the defendant is not entitled to a set-off of the said amount as claimed. This determination then answers issue number III.

In the light of my holding that Kshs. 2,448,000/= paid cannot be a basis for a set-off I do not think that the submission of the defendant with regard to the provisions of order 7 rule 3 of the Civil Procedure rules are relevant.

I have perused defence exhibits. There is a letter dated 12th January, 2005 addressed to the defendant by the plaintiff on the subject of unpaid cheques whose particulars are given therein. The defendant admitted the same. Those cheques were dated 3rd December, 2004, 10th December, 2004, 14th December, 2004 and 5th January, 2005 respectively. These are the cheques that the defendant claims to have replaced by its cheques dated 8th December, 2004, 3rd January, 2005, 11th January, 2005, 12th January, 2005, 16th January, 2005, 17th January, 2005, 18th January, 2005, 8th February, 2005 and 31st February, 2005 . Considering that the letter from the defendant was dated on 12th January, 2005, it can be safely assumed that payments of the defendant made earlier, i.e 8th December, 2004, 3rd January, 2005, 11th January, 2005 and 12th January, 2005 if at all must have been taken into account and given due credit.

Having carefully weighed the evidence adduced herein by the plaintiff as well as the defendant and voluminous exhibits, I am satisfied that the defendant's indebtedness to the plaintiff has been established on a balance of probability to the tune of Kshs. 9,776,580/=. I therefore enter judgment against the defendant in the said sum less Kshs. 1,000,000/= paid after the suit had been filed leaving a total of Kshs. 8,776,580/= plus interest . The plaintiff shall also have costs of this suit.

Judgment dated, signed and delivered at Kisii this 31st Day of March, 2011.

ASIKE-MAKHANDIA
JUDGE