



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

CIVIL CASE NO. 19 OF 2006

MOBIL AFRICA SALES INCORPORATEDPLAINTIFF

VERSUS

**TANGANYIKA INVESTMENTS OIL
TRANSPORT COMPANY LIMITED DEFENDANT**

JUDGMENT

The Plaintiff is a corporation incorporated in the state of Delaware, United States by America carrying on the business of marketing, selling, supplying and dealing with petroleum products worldwide.

By a Plaint dated 25th January 2006 filed in this court on the same date, the Plaintiff sued the Defendant claiming the following:-

- a) A sum of US\$93,000 or its equivalent KShs.6,869,445 at the time of filing suit.
- b) Interest on the above sum at court rates until payment in full.
- c) Costs of the suit.
- d) Any such further or other relief as the court may deem fit to grant.

The monies claimed are in respect of the sale by the Plaintiff to the defendant of 1000 Metric Tonnes of "JET A1" Aviation Fuel pursuant to an agreement entered between the parties on or about 29th March 2000 referred to as "Pro-Forma Invoice No.29/03/1872/2000". Specifically, the sum of USD93,000 represents a balance of the proceeds of sale remaining after the Plaintiff exercised its right of set-off against the Defendant under the contract of sale.

Despite being served with the hearing date well in advance the advocates for the Defendant attended court unprepared to defend the suit and the same proceeded ex parte, the said advocates having abandoned their representation for the Defendant but having not come out of the record.

The Plaintiff called one witness Benjamin Gathura Kingori (PW1) who was, at all material times the Director, Regional Supply, Sales and Pricing of Mobil Oil Kenya Limited which as stated in paragraph 16 of the Plaint provided the Plaintiff with professional, technical and commercial services in Kenya.

He testified that the Plaintiff was an affiliate of Mobil Oil Kenya Ltd, and that the transactions between the Plaintiff and the Defendant were done telegraphically in view of the fact that they involved international contracts where physical delivery of documents would not have been expedient. PW1 produced a bundle of documents (marked as exhibit 1) wherein at page 8 was displayed the Pro-Forma Invoice NO. . . . 29/03/1872/2000 – Amended, dated 29th March 2000, evidencing the agreement between the Plaintiff and the Defendant for the supply of 1000 MT of “JET A1” Aviation Fuel at the price of US\$298,000.

According to the agreement, the fuel was to be sold ITT Ex Engen Tanzania who were the appointed custodians in Dar-es Salaam, since Mobil Oil did not have storage facilities in Tanzania. The Defendant was mandated to complete customs documentation and to pay for the product direct to the US Account of Mobil Africa Sales Inc. while the product was in the Engen storage tanks and would only be released upon payment being received by the Plaintiff who would then issue the necessary approval for Engen to release the consignment.

It was PW1’s testimony that the Plaintiff supplied to the Defendant the 1000 Mt of “JET A1” fuel as per the Pro-Forma Invoice No 29/03/1872/2000 - Amended but that the same was released to the Defendant prior to the requisite approval being given to Engen and without any payment being remitted to Mobil Sales Africa Inc as required under the contract. He referred the court to a copy of an email dated 5th March 2003 (exhibited at page 12 of Exhibit 1) from the operations Manager – Engen Tanzania, which confirmed that the Defendant collected the consignment. The e-mail states however that the consignment was collected by the Defendant “after all formalities were complete and all customs and warehousing SBE’s were in place”.

PW1 testified further that the relationship between the parties herein continued despite the breach of the contract under the Pro-Forma Invoice No. 29/03/1872/2000 and in 2003, the parties herein entered into a further contract for the supply of 450 MT of gas oil and 240 MT of premium fuel to be imported from Saudi Arabia and sold F.O.B. Mombasa EX SOT (Shimanzi Oil Terminal) under a Pro-Forma Invoice No. TIOT/17.06.3512/2003 – Amended. Payment in USD was to be made either in cash into the Plaintiff’s account with the standard Chartered Bank, Muthaiga, Nairobi or by telegraphic transfer to the Plaintiffs’ account in the USA. The Pro-Forma Invoice, which appears at page 16 of exhibit 1 states the value of the consignment to be USD 202350. The Defendant paid USD 205000 into the Plaintiff’s account with the Standard Chartered Bank on 19th June 2003 as is evidenced by a deposit slip exhibited at page 17 of the Plaintiff’s bundle.

PW1 testified that the 2003 contract was frustrated by the fact that the vessel provided by the defendant for the loading of the consignment at Mombasa was of unacceptable condition. The Pro-Forma Invoice having stated, as a term of the contract that loading was subject to product availability and receipt of sufficient funds to cover all dues related to the seller, the Plaintiffs proceeded to set off the said sum of USD 205,000 against the sum of USD 298,000 outstanding on the earlier consignment of 1000 MT “Jet A1” fuel delivered under the Pro-Forma Invoice No. 29/03/1872/2000 leaving a balance of USD 93000 the subject matter of this suit.

In further testimony PW1 told the court that the Defendants made attempts to pressurize the Plaintiffs to refund the said sum of USD 205000 including the lodging of a complaint with the Banking Fraud Unit of the Central Bank of Kenya which did not result in anyone being charged with any offence relating thereto. A suit (H.C.C.C NO. 423 of 2005) filed by M/s Khaminwa & Khaminwa against the Plaintiff in respect of the said amount was also dismissed.

Counsel for the Plaintiff filed written submissions in support of the Plaintiff’s suit, submitting that the same had been proved by the evidence tendered which goes to show that all the issues arising from the pleadings herein have been satisfactorily answered in favour of the Plaintiff.

The Defendant filed a defence to the suit but did nothing else. The Plaintiff alone filed issues for determination which, in summary, are as follows:-

1. Whether the parties to this suit entered into a valid contract on 29th March 2000 under the terms of the Pro-Forma Invoice No.29/03/1872/2000 and whether they are bound by the terms thereof as pleaded in the Plaintiff.
2. Whether pursuant to the said contract the Defendant did order and the Plaintiff did supply the defendant with 1000 MT “JET A1” Aviation Fuel at the quoted price of USD298,000.
3. Whether the Defendant took delivery of the said consignment of 1000 MT JET A1 Aviation Fuel without paying for the same in breach of the above stated contract as pleaded in the Plaintiff.
4. Whether the taking delivery of the said consignment by the Defendant without paying for the same amounts to conversion of the Plaintiff’s goods.
5. Whether pursuant to the agreement entered between the parties on 19th June 2003 under the Pro-Forma Invoice NO TIOT/17.06.3512/2003 the Plaintiff was obliged to release the contracted 450 MT of Gas Oil and 250 MT of premium petrol against the USD205,000 paid to it notwithstanding that sums in respect of previous supplies had not been paid.
6. Whether the delivery of the consignment under Pro-Forma Invoice NO TIOT/17.06.3512/2003 – Amended was contingent upon other conditions or payments.
7. Whether the Plaintiff was entitled to set off the sum of USD205,000 against the outstanding debt of USD 298,000 as pleaded in the Plaintiff.
8. Whether the Defendant is legally indebted to the Plaintiff in the sum of USD93,000 claimed herein and whether the Plaintiff is entitled to judgment in the said sum alongside other reliefs as prayed in the Plaintiff.
9. Whether the cause of action arose within the jurisdiction of this Honorable court.

As the Defendant did not include a counter claim for the refund of the sum of USD205,000 in its defence field herein, I do not consider the same to be an issue for the courts determination in this judgment. Counsel for the Plaintiff cited the following authorities in support of the Plaintiff’s case.

1. Civil Procedure Act (Chapter 21 of the Laws of Kenya) & Civil Procedure Rules
2. Evidence Act (Chapter 80 of the Laws of Kenya)
3. The Sale of Goods Act (Chapter 31 of the Laws of Kenya)
4. Black’s Law Dictionary, Garner, Eighth Edition, Thomson West.
5. Clerk & Lindsell on Torts, Sweet & Maxwell, 16th Edition.

Regarding the issues, I find it appropriate that I deal with the issue of jurisdiction first. My finding is that the same is confirmed by the Agreement of 1st January 1997 between the Plaintiff and Mobil Oil Kenya Ltd for the performance of professional and International Services by Mobil Oil Kenya on behalf of the Plaintiff. The Defendants have recognized this agreement as being the basis upon which they contracted with the Plaintiff through Mobil Oil Kenya in relation to the contract of 19th June 2003 as stated in paragraphs 8,9 and 10 of the defence.

The Defendants ought to have sought to strike out the suit on jurisdiction if they truly believed in the challenge to jurisdiction as raised in paragraphs 11 of the defence, which is hereby deemed to have been abandoned. Therefore, this court finds that it has jurisdiction to determine the dispute herein.

I accept the Plaintiff's advocate's submission that the issues as set out in their statement of issues filed on 18th December 2006, which have been consolidated and summarized in this judgment, can only be answered in the affirmative in view of the uncontroverted oral and documentary evidence adduced by the Plaintiff.

More importantly I find that the Plaintiff was right in setting off the sum of USD 205,000 against the amount of USD 298,000 due from the Defendants in respect of the 1000 Metric Tonnes of "JET A1" Aviation Fuel delivered to the defendant under the Pro-Forma Invoice No. 29/03/1872/2000 and not paid for, and that the sum of USD 93000, being the difference thereof, is rightly due from the Defendant to the Plaintiff.

Accordingly I find that on the balance of probabilities the suit herein succeeds and is hereby allowed with costs to the Plaintiff.

Judgment is hereby entered for the Plaintiff against the Defendant as prayed in prayers (a), (b) and (c) of the Plaint.

DATED, SIGNED and DELIVERED at NAIROBI this 25th Day of MARCH 2011.

M.G. MUGO
JUDGE

In the presence of:

Mr. S. Amin
No appearance

For the Plaintiff
For the Defendant