



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 66 OF 2003

ALI ABDI MOHAMMED PLAINTIFF

VERSUS

KENYA SHELL AND BP COMPANY LIMITED DEFENDANT

JUDGMENT

The amended plaint dated 14th April, 2004 claims:-

- (1) General damages,
- (2) General damages for breach of contract,
- (3) Special damages of Kshs.43,250,000/=
- (4) Costs and interest.

In short the Plaintiff's case is that he entered into a distributor/reseller agreement with the Defendant on 17th July, 2000 and started getting supply of oil products on cash basis as from 18th August, 2000. He also averred that he had entered into lease agreement with three persons to supply the oil products and the said agreements were dated 1st January, 2000 which was before his agreement with the Defendant.

The Plaintiff bought the oil products from the Defendant upto 3rd January, 2001 and then he had to go home due to his ill health.

He did aver and testify that he was to pay for all products by Banker's Cheque, 24 hours before the delivery.

It is on record from the Plaintiff that the Defendant by a letter dated 3rd December, 2002 closed the account of the Plaintiff with effect from 1st January, 2003.

According to the Plaintiff, the Defendant had him arrested on 8th January, 2001 and he was placed in police custody for five days. It is also not disputed that the Plaintiff filed a civil suit for damages against the Defendant *inter alia* as a result of the said arrest but similarly, it is also true that the said case and the Plaintiff's appeal against the judgment were dismissed.

He denied that he refused to purchase the petroleum products as the prices thereof were hiked by the Defendant and averred that he was refused by the Defendant's officials to get the supply of the products.

It is thus averred that the Defendant breached the contract and accordingly the Plaintiff has suffered the loss.

As against the averrements made in paragraph 5 (b) to the effect that it is not true that the Plaintiff had not accepted the new price, the Plaintiff in particulars (I) of breach of contract, specifically in paragraph 6 (a) of the amended plaint, has averred and I quote:-

“I. The Defendant without notification and contrary to the Agreement hiked the price of its products and attempted to impose the said price upon the Plaintiff.”

Obviously, the above two averrements do contradict each other.

The Defendant in its statement of defence dated 6th May, 2004 denies that there was any implied term of contract to give notice and has averred that it was entitled to cancel the agreement without notice as the Plaintiff was in direct breach and contravention of Clause 13 and 17 of the Agreement.

During cross-examination of the Plaintiff, it was brought on record that the Agreement (P Exhibit 1) was not an enforceable contract as it was not signed by either party and specifically not signed and stamped by the company seal of the Defendant.

Apart from the said Agreement/Contract, the Plaintiff has also produced a letter dated 18th October, 2001 addressed to him by the Defendant's Financial Manager (3rd Reminder) to settle the outstanding due in the sum of Kshs.661,233.00/= as well as the letter dated 3rd December 2002 stating *inter alia* that his account shall be closed with effect from 1st January, 2003 which letter is challenged by the Plaintiff as being written in breach of implied term to give him reasonable notice before termination.

PW2 testified that he was employed as Supervisor of Marenga Beach – Port Victoria Petrol Station as well as other two stations at Yala and Busia.

He introduced and referred to the summary of sales including sale of petroleum products, income from Cafeteria and Tyre puncture repairs in respect of the said three stations. He stated that he used to record the daily summary at the end of each day for five months.

Calculations of petroleum products is done considering the discount of Kshs.4.75 per litre allowed by the Agreement. According to him, his employment was terminated on 5th January, 2001 as pumps became dry. It is noteworthy that the Plaintiff himself has testified that he went home because of his ill health and the last purchase of petroleum products by him was on 3rd January, 2001. PW2 referred to two pages, from the bundle of documents, namely 17 and 18 in his evidence though the document itself has not been produced in evidence.

I do tend to note that the averrements that the Accounts were written daily for business of all the three stations by PW2, could be logically impossible to be done by one person on daily basis. Moreover, the accounts are purportedly written by PW2 without any substantiating documents to support veracity of the figures.

I further note that three invoices/delivery notes for 2rd, 3rd and 4th January, 2001 from the Defendant in respect of the Plaintiff's account do not exceed shs.491,000/=. Moreover, the discount has already been noted in those invoices which were given to the Plaintiff on the purchase and supply of the products.

I do further note that P Exhibit 9, the two notification or index of price of petroleum products, are dated 9th August, 2000 and 27th November, 2000, which is prior to the Plaintiff ceasing to purchase the petrol products.

The Defence called one witness who was the Commercial Manager of the Defendant. He described the Plaintiff as a reseller as against other types of customers namely retailer and Industrial comprising of manufacturing companies.

According to him, reseller shall get supply on payments by cash/bankers' cheque on placing orders. The Plaintiff purchased the product on the basis of reseller from 1st August, 2000 to January, 2001. This fact is also testified and confirmed by the Plaintiff. As per his testimony, because the account was inactive the letter (P Exhibit 10) was written which is described as a Standard letter written to all inactive account holders and accordingly, account was closed. He described the mention of removal of equipment as superficial and stressed that the reference did not apply to the Plaintiff. In any event, the Plaintiff has also relied on the said letter as the basis of his claim on breach of contract.

He also emphasized that as a reseller the Defendant would not have any control on the price, the place and volume ordered. He described those factors as prerogatives of the purchasers.

The e-mail indicating the price of products was circulated to all the resellers. It only indicated the revised sale price of the products.

He was shown the Agreement P Exhibit 1. He disassociated with it by stating that it is not genuine and differs from the ones used by the Defendant. The Agreement made by the Defendant are more detailed and has place for Company seal. Moreover, it was pointed out that it is not signed by the company as per company law.

He insisted that the relationship of purchaser and supplier ends with supply of products and payments. Any reseller could also buy petroleum products from any other oil companies. Moreover, the Defendant did not close the account for over 15 months which period was more than reasonable. He reiterated that during that time, the plaintiff was free to buy and sell either from the Defendant or from any other companies.

He produced Record of Appeal as regards CA No. 43/07 High Court at Kisumu.

In cross-examination, he agreed that as the Plaintiff was sold the petroleum products he must have complied with requirements to be recognized as such purchaser by the Defendant and that he was to resell the products within Kisumu Area. He however, added that if he gets a buyer from Nairobi Area or other areas, which would be economical, the Defendant could not stop him. He denied having any record of agreement with the Plaintiff.

With the above pleadings and evidence, the following issues are for determination, namely:-

- (1) Whether there was a binding agreement between the parties,***
- (2) if no, whether the parties performed the terms of agreement,***
- (3) whether the Plaintiff suffered any loss.***

From the above referred pleadings, evidence and observations, it cannot be disputed that the evidence and pleadings are convoluted.

The learned counsel for the Plaintiff contended vehemently that the typed name and ID Card on the Agreement (P Exhibit 1) could be enough to presume that the same was a signature of the Plaintiff. However, there is no substantiation from the Plaintiff that he signed the same or that the Defendant also signed the same. P Exhibit 1 (the Agreement), although shows a stamp of an Advocate apparently does not bear the signature of the Plaintiff. As against that as per the evidence from the Plaintiff, he has signed the three lease Agreements produced by him (P Exhibits 2, 3 and 4).

More striking is the fact that there is no place for the Kenya Shell Limited to sign on the Agreement (P Exhibit 1). In the premises, I do tend to agree with the submissions made by the learned counsel for the

Defendant that the said omission does show that the agreement did not emanate from the Defendant. I further observe that the receipts and the invoices from the Defendant produced by the Plaintiff do show that it is embossed by the company Logo and it can be highly unlikely that the Agreement which was averred to have been supplied by the Defendant can be in the format which is shown by the Plaintiff.

I also agree that the Defendant has failed to produce any sample of agreement but I do pause here and wonder, whether the onus to prove validity of the agreement which is produced by the Plaintiff,, can be shifted to the Defendant? I think the answer is in 'NO'.

The learned counsel for the Plaintiff also stressed that the Defendant, in its defence, having acquiesced to the existence of the agreement, cannot now take 360 degree about turn and deny the same. It was urged that the court should adopt the *contra proferentum* rule in interpreting the signature since the Agreement emanated from the Defendant. But in my view, I am not satisfied that it has emanated from the Defendant.

However, it cannot be overlooked that the Plaintiff did business with the Defendant for six months and moreover, there were correspondence from the Defendant reminding the Plaintiff of overdue accounts as well as the Notice of Closure of the accounts. Furthermore, DW1 also agreed that before the Defendant started supplying the petroleum products to the Plaintiff, he ought to have complied with prior requirements of the Defendant. Thus there can be no denial of the relationship of purchaser and seller of products between the parties. But what is brought before the court does fall short of the requirement of an agreement in writing. Even if the Plaintiff could be right that he signed his part of the contract, what is before the court is an unsigned agreement even by the Plaintiff.

I do thus find that there was no valid agreement in writing between the parties herein.

I shall be pardoned if I do not enumerate several authorities cited by the learned counsel for the Plaintiff, but I do tend to agree with the learned counsel for the Defendant that they are relevantly distinguishable on the facts of this case.

Even if I am wrong in finding what I did hereinbefore, from the facts of this case, it has come out very clearly that it was the Plaintiff who stopped taking supply as from 3rd January, 2001 due to health problem. Apart from the contradictions as to the pleadings on the price hike by the Plaintiff as observed hereinbefore, the documents in P Exhibit 9 are dated 27th November, 2000 and 9th August, 2000 (showing the revised price) which are long before the Plaintiff stopped purchasing the petroleum products. Thus the Plaintiff has miserably failed to prove any nexus between those e-mails and the stoppage of the purchase or supply.

The issue of Criminal case against the Plaintiff and civil case filed by the Plaintiff against the Defendant thereafter are clearly explained by the defence witness. The arrest was after few days (three days!) from the Plaintiff stopping the purchase and no evidence is led to prove any malice on the part of the Defendant to get him arrested. If that was so, why the Defendant would send the Plaintiff 3rd reminder to pay the outstanding due on 28th October, 2001 (long after his arrest) and Notice of Closure of Account in December, 2001.

With these facts before the court, I do find that the Plaintiff has failed to prove, even on balance of probability, that the Defendant has failed to perform its obligations as alleged..

I shall also tend to agree with the learned counsel for the Defendant that there cannot be any order of general damages in respect of the breach of the contractual obligations. This I am observing, in case I am held to be wrong, in my finding as regards 2nd issue i.e. whether there was a breach of performance of agreement.

See ***Municipal Council of Thika –vs- Elizabeth Wambui Mukina HCCS No. 137 of 2001 2001 eKLR*** and ***British Westing House Electric Co. –vs- Underground Electric (1912) AC 673.***

Coming to the claim of special damages, I shall reiterate my finding that there is no breach of any contractual obligation by the Defendant.

I may add thereto that it is trite law that special damages has to be pleaded specifically and proved strictly. I have detailed the evidence from the Plaintiff and observe that the lease agreements had been entered almost more than six months prior to the first transaction with the Defendant and moreover, all of them have lapsed due to afflux of time.

The writings of accounts by PW2 do not meet the standard of proof even on balance of probability, let alone the stricter proof required to prove special damages.

In short, I find that the Plaintiff having failed to prove his case, the Plaint is dismissed with costs.

Orders accordingly.

Dated, signed and delivered at Nairobi this 22nd day of **March, 2011**

K. H. RAWAL
JUDGE
22.03.2011