



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 252 OF 2010

B.M.P. BULK MEDICINES & PHARMACEUTICALS GMBH.....PLAINTIFF

- VERSUS -

BAKELS EAST AFRICA LIMITEDDEFENDANT

JUDGMENT

1. This is a claim by the plaintiff for US \$ 33,219.02 being the contract price for goods supplied to the defendant. It is common ground that on or about 12th September 2008 and at the request and instance of the defendant, the plaintiff supplied 12.5 tonnes of sodium acid pyrophosphate and 12.5 tonnes of sodium bicarbonate at the price of US \$ 33,337.50. A few bags of the goods in the sum of US \$ 118.48 were missing in the consignment. The plaintiff accordingly gave a credit note for that sum leaving the balance of US \$ 33,219.02 now claimed in the suit.
2. The two products are essential products in the making of baking powder which is supposed to produce carbon dioxide to raise cakes and confectionaries. The defendant refused to pay for the goods primarily because the goods did not fit the quality or description and were unfit for the intended purpose. The defendant's case, in sum, is that it was entitled to reject the goods for breach of warranties or for misrepresentation by the plaintiff.
3. The plaintiff called two witnesses. The first was Tatenda Mukanda, area manager of the plaintiff. He produced a proforma invoice number 21072008/01 dated 22nd July 2008 and a confirmation for contract number 83651 of 31st July 2008 setting out the terms and conditions of sale as well as delivery of the goods to the defendant. The goods were packed in bags as per the packaging list number 083651. The plaintiff then forwarded the invoice number 103911 dated 12th September 2008 and shipped the goods as particularized in the bill of lading No EPIRCHNXNG1080040 from Xingang China. Before the goods were shipped a certificate of analysis of the goods was sent to the defendant through a letter dated 13th October 2008. Those two certificates of analysis appear in the defendant's bundle of documents at pages 15 and 16. The plaintiff's case is that the defendant took possession of the goods, utilized a substantial portion and did not complain about the quality of the goods or the price. The plaintiff's witnesses testified that the defendant confirmed receipt of the goods save that a few bags were missing and for which the plaintiff gave a credit note number 12221 dated 12th January 2009 for US \$ 118.48. The defendant refused to pay the purchase price despite several reminders. Sometime around 25th March 2009 the defendant advised the plaintiff that it could only pay the amount in two installments on 16th April 2009

and 30th April 2009. It did not. In the meantime, the defendant started complaining that the price of the goods was more expensive by a margin of Kshs 17 per kilogram in comparison with other suppliers.

The defendant also claimed the product did not meet the quality standards for use by the plaintiff in making baking powder, as aforesaid. The plaintiff's area manager (PW1) travelled to Kenya and he and PW2 (Susan Kuria, a director of Essential Drugs) met with the defendant's director Jotham Kahi on the pending bill. PW2 says that at that meeting, the defendant did not raise issues of quality but agreed to pay later. Susan Kuria was also a local supplier of pharmaceutical and veterinary products. She had at some point ordered from the defendant 2 metric tonnes of the sodium acid pyrophosphate supplied by the plaintiff for one of her local customers Trufoods Limited.

Trufoods rejected the consignment because it was not from their approved manufacturer. That rejection was one of the reasons the defendant advanced in its failure to pay the plaintiff. Her husband used to work for the plaintiff but she was emphatic that her company, Essential Drugs, was not a local agent for the plaintiff.

4. The defendant on its part called Jotham Kahi, its managing director as a witness. His evidence confirmed the material contract terms aforesaid and that the defendant received the goods. He said he was persuaded to buy the goods by a Mr. Warui, the husband of PW2. He stated he ordered a huge consignment because Essential Drugs Limited would take some of it. He also testified that Essential Drugs Limited was the local agents of the plaintiff company.

When the consignment arrived the defendant used about 13 tonnes of it (that is about half of it) to make its baking powder. It then realized that their sales were going down. It says that when PW2 took the 2 metric tonnes to Trufoods and was rejected, it dawned on it that the quality of the product was poor and must account for the poor sales. It was its evidence that the purity standard was below the specifications. At that point it took a sample to Unga Laboratories for testing. A report dated 21st May 2010 was produced in evidence showing that the sodium bicarbonate had a purity of 99.5% while the sodium acid pyrophosphate was 61.4%. It also made reference to the local Kenya Standard of the Kenya Bureau of Standards on baking powder. The defendant's position was that the sodium acid purity level should be at least 90% to produce enough carbon dioxide to raise the cake.

The purity level of the sodium bicarbonate was okay. It was also the defendant's case that the price of the goods was higher by Kshs 17 per kilogram compared to other supplies. It did concede the price was affected by currency fluctuations. It denied acknowledging indebtedness and stated finally that since the product did not meet quality specifications or acceptable prices, the defendant was entitled to reject it but the plaintiff had refused to accept it back.

5. My view of the matter is this. I am satisfied from the evidence that the defendant ordered and the plaintiff supplied to it the goods the subject matter of the contract at the final purchase price of US \$ 33,219.02. The defendant has used 13 tonnes of the 25 tonnes supplied by the plaintiff. Consideration has thus passed and a binding contract came into force.

6. The defendant received the goods on or about 3rd November 2008. It did not raise the issue of pricing until 30th January 2009 but following the meeting with the plaintiff's representative, it committed itself in an email dated 25th March 2009 to pay for the consignment in two installments on 16th April 2009 and 30th April 2009. That to me constitutes an admission of the debt. But even assuming that there was no such admission, the defendant, whose principal witness and Managing director has 40 years experience in the baking and confectionary industry, had ordered for the goods and accepted the price way back on 12th September 2008 but did not raise an issue until 30th January 2009.

I hold that the defendant cannot resile from the contract price. It admits further that it has only raised up cudgels with the price due to currency fluctuations. Since this was a fixed price contract denominated in dollar terms, the fluctuations cannot be blamed on the plaintiff supplier. Finally on that point, under the Sale of Goods Act, it is the duty of the seller to deliver the goods and the buyer to accept and pay for

them with the terms of contract of sale. I am of the considered view that it is not the business of the courts to rewrite contracts for parties. When business people enter into commercial contracts they should be held to their bargain unless the contract was so unconscionable as to be against public policy. This is not a novel proposition. It was so held by Ringera J, as he then was, in Morris & Company Ltd Vs Kenya Commercial Bank Limited [2003] E A 605 when he stated;

“I have always understood that it is the duty of any person entering into a commercial transaction particularly one in which a large amount of money is involved to obtain the best possible legal advice so that he can better understand his obligations under the documents to which he appends his signature or seal”.

That then takes me back to the issue of purity quality of the product. The defendant received the goods on 3rd November 2008. It used 50% of the goods being about 13 metric tonnes. When the goods were ordered, the defendant merely sought supply of food grade raw material of sodium bicarbonate and sodium acid pyrophosphate. No assay measure was given save that the said two certificates of analysis were forwarded to the defendant with the bill of lading. I accept that under those circumstances, the defendant was well aware of the chemical analysis of the goods to be shipped. By sealing a contract contained in the proforma invoice, sales confirmation and final invoice, it became bound to the contract.

7. It is instructive that the defendant, save for the missing bags of some of the product, for which a credit note of US \$ 118.48 was given, did not raise complaints of quality until March 2009. The subsequent testing prompted by the rejection of PW2's goods at Trufoods Limited did not take place at Unga Laboratories until 21st May 2010. It was a belated test.

And the test sample, assuming it was the original product from the plaintiff, had by that time been in the custody of the defendant and in use by the defendant for nearly two years. I hold that under those circumstances the certificate of analysis issued by Unga Laboratories was unreliable and incapable of being a traverse to the original certificates of analysis dated 16th August 2008. For those same reasons, I am unable to say that the goods supplied by the plaintiff did not meet the Kenya Standard K S 346:2000 based on the impugned analysis at Unga Laboratories.

Fundamentally, although the defendant alleged its sales had gone down after using the plaintiff's product in its baking powder, no evidence of those sales statistics was led. And by the time the defendant was raising these issues of quality, it had already consumed 13 metric tonnes and not paid a penny to the plaintiff. Section 36 of the Sale of Goods Act is on all fours. The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them.

Here, the decision in Colourprint Vs Prepress Productions [2003] 1 EA 45 is illuminating at page 49.

“in my opinion the period of over two months was more than reasonable within the meaning of the above section (section 36 Sale of Goods Act) for the defendant to intimate to the plaintiff that it had rejected the items. The defendant's failure to go intimate means that in law it accepted the goods”.

As the defendant did not specify the purpose for the goods or seek any clarification I find there was no implied warranty or condition as to the quality or fitness for any particular purpose. It took the risk up front. I thus hold that the defendant was not entitled in the year 2009 to reject or return the goods and was bound to pay for them under the contract.

8. Lastly, a very weak argument was projected by the defendant that it bought the huge consignment because PW2, or the company known as Essential Drugs would buy some of it. A further limb of that argument was that the latter company was an agent of the plaintiff and that PW2's husband persuaded the defendant to enter into the contract. I must say that PW2 denied this and the defendant did not lead any documentary or other credible evidence to prove the agency. And in view of what I have already held the

defence of agency does not lie and cannot save the plaintiff from the obligations under the binding contract. I find that there was a distinct contractual duty on the defendant to pay for the goods delivered by the plaintiff. The entire defence of the defendant thus crumbles.

9. Accordingly, I enter judgment in favour of the plaintiff against the defendant in the sum of US \$ 33,219.02. I award interest at court rates from the date of suit (22nd April 2010) till full payment. The plaintiff shall have costs of the suit.

DATED and DELIVERED at NAIROBI this 25th day of November, 2011.

G.K. KIMONDO
JUDGE

Judgment read in open court in the presence of

Mrs. Mbugua for the Plaintiff.

No appearance for the Defendant.