



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 1176 of 2002

GAILEY & ROBERTS LIMITED.....PLAINTIFF
VERSUS

SUNIL BEHAL T/A
KRISHAN BEHAL & SONS.....1ST DEFENDANT
JIMI MAINA.....2ND DEFENDANT
KARN BEHAL.....3RD DEFENDANT

JUDGMENT

The plaintiff's claim as against the defendants is for the sum of KShs.6,208,894/06 which it alleges is on account of goods sold and delivered, materials supplied, transportation services rendered, and for repair work done on the defendant's motor vehicles and machines at the request of the defendant at Nairobi during the years 2000 and 2001. The defendants filed defence denying that they were indebted to the plaintiff to the said sum of KShs.6,202,894/06 and put the plaintiff to strict proof thereof. In particular, the defendants denied that the plaintiff had ever sold and delivered any goods to them, or rendered transportation services or repaired any of the defendants' motor vehicles and put the plaintiff to strict proof thereof. The defendants further denied that they issued cheques to the plaintiff, which upon presentation to the bank were returned unpaid. They averred that they were justified to stop the payment of the cheques in question because the plaintiff fraudulently represented to the defendants that it had fitted cylinder heads on machines and effected repairs thereon, which was false in the circumstances. The defendants urged the court to dismiss the plaintiff's suit with costs.

The plaintiff had initially sued Sunil Behal, who at the time the suit was filed was trading as Krishan Behal & Sons. Sunil Behal died on 30th September 2005. Karn Behal and Jimi Maina, applied for, and were granted limited grant of letters of administration to temporarily manage the estate of the deceased, including the business registered under the name Krishan Behal & Sons. On 6th October 2006, the said Karn Behal and Jimi Maina were in enjoined as defendants in the present suit in their capacity as the legal representatives of Sunil Behal – deceased.

During the hearing of the case, I heard oral testimony from Taju Odewale, a former managing director of the plaintiff and Joseph Kariuki Kamau, a former purchasing manager of Krishan Behal & Sons. After the close of both the plaintiff's and the defendants' case, counsel for both parties filed written closing submissions. I have considered the said oral evidence, including the documentary evidence. I have also considered the written closing submissions, including the authorities cited in support of their respective cases.

Certain facts are not in dispute in this judgment. It is not disputed that the plaintiff and the business, Krishan Behal & Sons had a business relationship. Krishan Behal & Sons was engaged in the construction business and in particular in the road construction business. The business owned several heavy construction equipment and machinery that enabled it perform its contracts. The plaintiff was at the material time the local agent of Caterpillar Heavy Machinery equipment. From the evidence adduced, Krishan Behal & Sons (*hereinafter referred to as the company*) maintained two accounts with the plaintiff; one account was in respect of spare parts purchased on credit by the business. Another account was the workshop account. This was in respect of repairs that the plaintiff undertook at the request of the company on the machines owned by the company. The two accounts were running accounts which the company periodically paid on account.

From the evidence adduced by both witnesses, it was apparent that for the plaintiff to render any services to the company, or supply any spare parts to the company, the company either issued local purchasing orders or work orders. In his evidence, the plaintiff's witness tabulated a list of local purchasing orders and work orders which were issued by the company. This enabled the plaintiff to either supply spare parts and or undertake repairs on the company's machinery. Whenever the company issued a local purchasing order or a work order, and if the plaintiff rendered the service or sold the parts, an invoice was raised stating the amount that the spare parts or the services cost. The local purchasing orders, the work orders and the invoices specifying the cost of the spare parts and the cost of the work done were produced in evidence and are contained in the bundle of documents produced as Exhibit 1.

Although the defendants disputed that such services were ever rendered, or that the spare parts supplied were indeed supplied to the company, upon perusal of the exhibits produced, it was clear that the plaintiff established to the required standard of proof on a balance of probabilities that the spare parts were indeed sold and repair services rendered. The evidence adduced clearly showed that the plaintiff and the company had a business relationship which later soured when the company failed to pay for the spare parts and for the services rendered. A particular complaint which became a live issue during the hearing of this case was whether the plaintiff supplied two cylinder heads when the plaintiff was requested by the company to repair the company's caterpillar model D8K. The company issued a work order on 10th April 2000 requiring the plaintiff to check and repair the caterpillar. An employee of the plaintiff went to Maua where the caterpillar was situated and examined the caterpillar with a view to having it repaired. In a report dated 29th April 2000, the plaintiff noted that the company had requested it to fit two cylinder heads on the caterpillar. The two cylinder heads were sourced from elsewhere by the company. The plaintiff only offered labour and expertise in fitting the cylinder heads in the caterpillar.

It later emerged that the two cylinder heads could not fit on the caterpillar. The caterpillar was not therefore satisfactorily repaired to enable it perform its tasks. The defendants blamed the plaintiff for allegedly failing to repair the caterpillar. It is their view that the company should not be compelled to pay the amount demanded by the plaintiff in regard to that invoice since no services were rendered. I have evaluated the evidence in that respect. It was apparent to the court that the plaintiff rendered services that it was instructed to perform by the company. The plaintiff cannot be blamed for substandard spare parts which the company itself had procured from other sources.

The story is similar in respect of other local purchasing orders and work orders issued by the company. Some of the services included transportation services. The company requested the plaintiff to transport the heavy machinery from the construction site to Nairobi for the purpose of repairs to be done. In each instance, the plaintiff supplied the parts that were required by the company or rendered services on instructions of the company. In each instance, the plaintiff raised an invoice billing the company for the services rendered. The plaintiff issued a running statement for the two accounts that were maintained by the company. The company erratically paid on account. At some point in 2001, the company completely failed to pay the amount due. The plaintiff applied pressure to the company to pay the amount then due and owing from it. In purported part payment of the outstanding amount, the company issued a cheque of Kshs.2,704,123.30. This cheque is dated 1st September 2001. The cheque was presented to the bank by the plaintiff but was returned unpaid. Efforts by the plaintiff to have the defendant pay this amount resulted in acrimonious exchange of letters between the plaintiff and the company. The plaintiff's efforts were to no avail hence the filing of this suit. Upon evaluation of the entire evidence adduced in this case, I was convinced to the required standard of proof on a balance of probabilities that the plaintiff has established that it was owed the said sum of Kshs.6,202,894.06. I found no merit with the defence offered by the defendants.

In the premises therefore, I enter judgment for the plaintiff as against the defendants, jointly and severally, for the sum of Kshs.6,202,894.06 together with costs and interest. Interest shall be paid at court rates from the date of filing suit.

DATED AT NAIROBI THIS 22ND DAY OF JANUARY 2010.

L. KIMARU
JUDGE