



CIVIL PRACTICE AND PROCEDURE

Ø Can a party seek to amend after parties have closed that case under S. 99 or S. 1A of Civil Procedure Act

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

HIGH COURT CIVIL CASE NO. 15 OF 2005

MT. KENYA BOTTLERS LTD.....PLAINTIFF

VERSUS

DANIEL KANYURU.....DEFENDANT

JUDGMENT

PW1 Patrick Mwai Kariuki is the management accountant for the plaintiff. His work entails ensuring that the plaintiff's debts are paid. From the documents he had he was able to tell that the defendant was appointed as a distributor of the plaintiff's products, that is, soft beverage. His area of distribution was Maua Town. He referred to the agreement between the plaintiff and the defendant dated 29th February 2000. This was submitted in evidence as an exhibit. It should however be noted that the plaint refers to two agreements dated 24th and 26th February 2000. According to this witness, the plaintiff delivered its products to the defendant up to the year 2004. It was in that year that it was noted that the defendant was delaying in making payment for the sodas and the crates. The plaintiff claims that the defendant did not surrender 2,471 crates and bottles. These were valued at Kshs. 2,091,870/=. He produced an invoice from Central Glass Company where he said the plaintiff buys bottles. This was to show that each bottle cost Kshs. 20.20/=. That amount multiplied with the total number of bottles the defendant had belonging to the plaintiff, that is, 2,471 bottles plus V.A.T it brings the amount the defendant owes the plaintiff in that regard to Kshs. 2,091,868/=. He also stated that the plaintiff was claiming from the defendant the value of the beverage delivered to him valued at Kshs. 1,795,259.70/=. He produced a statement of account showing those amounts that the defendant owed the plaintiff as P.Exh2. He also produced a bundle of invoices for those products. On being cross examined, PW1 said that he joined the plaintiff employment in the year 2005. His evidence therefore was from the documents and records he found at the plaintiff company. He accepted that the P.Exh1, that is the agreement dated 29th February 2000 was to run for a period of one year and was subject to renew after that one year. He conceded that there was no agreement showing that the agreement of 29th February 2000 was renewed. The standard procedure in the plaintiff's company in the year 2004 was that payment was done on delivery. The witness said that the orders of the defendant were made through the phone. He however had no documents to prove the same. He also confirmed that the plaintiff's exhibit number 3, that is the bundle of invoices did not show that the defendant acknowledged receipt of the plaintiff's products. This witness said the invoices were

signed by other people in the defendant's store. He further said that the plaintiff products were delivered by the plaintiff's agent who was based in Nyeri. The witness then went to say:-

“Our sales staff on the ground ensure goods are received. Defendant had not appointed anyone to receive the goods on his behalf.”

On being pushed further in cross examination by defence counsel, this witness was unable to show any invoice that had been signed by the defendant. The witness further confirmed that the defendant was not consulted when the invoices or the delivery notes were prepared and neither was he consulted when the plaintiff's statement of account, that is P.Exh2 was prepared. He however said that the goods were received by the defendant. He denied that the defendant stopped receiving the plaintiff's products on credit when the agreement lapsed. He also denied that the defendant was harassed when he began to receive products from other suppliers. When he was asked to say which contract the defendant had breached the witness responded by saying that he had breached an implied contract by conduct. On being re-examined, this witness stated that the plaintiff would ordinarily stop supplying products to a person whose agreement has ended and where there is a disagreement. However, according to him, the records show that the defendant did business with the plaintiff for five years. The defendant in evidence said that he is a business man at Maua town. He transacted business with the plaintiff from 1980 to 1999. He said that he would buy beverages from the plaintiff's company during those years. He used to place his order through a written paper which he would hand over to the plaintiff's sales men. The plaintiff salesmen in turn would write out the order on a hard cover book and would later deliver the products to him. He said that he would pay for the products on delivery either by cash or by cheque. He would only make such payment when he was satisfied with the products that were delivered. He said that he personally would have to be satisfied that the product was satisfactory before payment. He however stopped receiving those products from the plaintiff in November 1999. From that period, he began to buy the same products from another source outside Meru. This other supplier was based in Runyenjes. The defendant denied having signed the distribution agreement P.Exh1. The defendant then stated that the plaintiff had not produced before court the agreements that are pleaded in the plaint. In any case he said by 29th February 2000 he was not receiving products from the plaintiff. On the P.Exh2, being referred to him, that is the accounts, he stated that the amounts reflected were incurred between 21st March 2004 to 7th July 2004. By then, he was not receiving products from the plaintiff. He also commented by saying that the plaintiff's accounts of the amount they state he allegedly owes them had at the beginning reflected a balance brought forward of Kshs. 736,024/=. That account does not state where the amount brought forward comes from or which period it relates to. The defendant denied that he received any invoices. When he looked at P.Exh3, he said that he did not acknowledge any of those invoices and further stated that the only thing in those invoices which showed that they related to him was his printed name and his address. He however denied having received those products. He also denied that he had a store keeper who received the products. He also denied having made an order through the telephone. He suggested that the plaintiff's claim was actuated by malice because he stopped getting their products. When he was cross examined, he again emphasized that he traded with the plaintiff from 1980 to 1999. He was insistent that he used to write out his order for the products he required. He said his business between himself and the plaintiff was on cash basis. He did not keep copies of the papers where he noted his order. He confirmed that he had been in business for a period of 30 years. The cash receipts that were issued to him for the period of 1999 have since been disposed. He also asked the court as he was being cross examined to look at the signature on his national identity card to confirm that it bore no similarity to the signature in the distribution of agreement P.Exh1. He said that he ordinarily only employed casual workers at his business. They assist him to offload products on delivery. Since the shop was his only business, he was always present in the shop. He said that the plaintiff's salesmen on discovering that he was getting products from elsewhere, they were not happy. They even threatened those that were supplying him with the products. He further said that the plaintiff's system of operation was that, a client was required to pay for the bottles when he first obtained the plaintiff's products, but thereafter he would use the bottles that he had paid for to get more beverages from the plaintiff. According to him therefore, there was no requirement after the first purchase of those bottles to pay for empty bottles and crates in subsequent purchases.

The plaintiff pleaded in the plaint that the agreements which the defendant breached were dated 24th and 26th February 2000. By that agreement, the plaintiff had agreed to supply and the defendant had agreed to pay for beverages. From that relationship, the plaintiff pleaded that the defendant owed it Kshs. 1,795,259/= being the amount of beverage supplied and Kshs. 2,091,870/= being the value of the empty bottles and cases the defendant failed to return to the plaintiff. The defendant by his defence denied the plaintiff's claim in respect of the two claims. He stated that he was not liable to pay the plaintiff the amount claimed in the plaint. As stated before, there is a discrepancy between the agreements pleaded in the plaint and the agreement exhibited in evidence as P.Exh1. The plaintiff did not produce either the agreement of 24th or 26th February 2000. Before judgment, the plaintiff sought the court's leave to amend the plaint to reflect the date of plaintiff's exhibit number one. The plaintiff was unsuccessful and by this court's ruling dated 26th July 2010, the court found that to allow the amendment after both parties had closed their case would be prejudicial to the defendant and no amount of costs would compensate the defendant. The plaintiff presented before court written submissions by its counsel. It was argued in those submissions that the court could invoke the slip rule of the Civil Procedure Act to amend the date appearing in the plaint from 24th/26th February 2000 to 29th February 2000. The slip rule is under section 99 of the Civil Procedure Act. It provides as follows:-

“Clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the court either of its own motion or on the application of any of the parties.”

That section as can be seen clearly applies to the amendment of judgments, decrees and orders. The plaintiff's claim does not fit into the definition of judgment decree or order. I therefore reject the plaintiff's counsel arguments in that regard. I also reject the plaintiff's counsel's attempt to invoke the overriding principle of the Civil Procedure Act as set out in section 1A of that Act. That section provides the overriding principle which should guide the court in applying the Civil Procedure Act and Rules. That section provides as follows:-

“1. (a) (1) the overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.

(2) The court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).

(3) A party to civil proceedings or an advocate for such a party is under a duty to assist the court to further the overriding objective

of the Act and to that effect, to participate in the processes of the court and to comply with the directions and orders of the court.”

It is clear that the Civil Procedure Act and Rules should be applied in such a way to facilitate the just expeditious proportionate and affordable resolution of civil disputes. Under section 1B (1) the court has the duty to ensure the attainment of the overriding principle. By that section, when a court is handling civil matters before it, it should for the purpose of attaining the overriding principle aim at:-

“1B (1) For the purpose of furthering the overriding objective specified in section 1A, the court shall handle all matters presented before it for the purpose of attaining the following aims:-

- (a) The just determination of the proceedings;***
- (b) The efficient disposal of the business of the court***
- (c) The efficient use of the available judicial and administrative resource;***
- (d) The timely disposal of the proceedings, and all other proceedings in the court at a cost affordable by the respective parties; and***
- (e) The use of suitable technology.***

For the plaintiff to seek at this stage of submissions, that is after both parties have closed their case and just before judgment, to amend the plaint would in my view be unjust to the defendant. The defendant if such an amendment was allowed would be denied the opportunity to address himself on the evidence relating to that amendment. To therefore accede to the plaintiff's request to amend a pleading at this late stage when this court is writing its judgment would not aid in the attainment of the overriding principle of the Civil Procedure Act. There are clear provisions for amendments of pleadings in the Civil Procedure Rules which the plaintiff invoked and was not successful. It further is clear that in the plaintiff again seeking the same orders that were rejected by this court is bleaching the rule of *res judicata*. The plaintiff is essentially seeking an amendment through the back door. It was submitted by the plaintiff's counsel that the defendant's defence was a mere denial and that the defendant had not pleaded that he did not sign the distribution agreement. My simple answer to that is that the plaintiff in the plaint pleaded that the defendant had signed the distribution agreement dated 24th and 26th February 2000. Those agreements were not produced before court to prove that the defendant signed them. The defendant's defence therefore cannot be said to be a mere denial. He denied signing the agreements pleaded in the plaint. The defendant can also not be asked to begin to defend himself until the plaintiff has laid before court a case worthy of defence. The plaintiff did not prove a case as far as the distribution agreements were concerned. On the amount claimed, I have had an opportunity to peruse the plaintiff's exhibit number three a bundle of invoices. I have found that the plaintiff even in those exhibits did not prove a case against the defendant which the defendant would be required to respond to. Firstly, the plaintiff stated that the defendant did not sign any of the invoices contained in the P.Exh3. Indeed PW1 said that the defendant did not sign any of the invoices. There is no evidence before court that on expiry of P.Exh1, the distribution agreement, that is, in February 2001 that the defendant agreed to further be supplied with the plaintiff's products on credit up to the year 2004. The year 2004 is when the amount which is claimed in this case was incurred. The plaintiff's exhibit number two that is, the account prepared by the plaintiff fails to entirely support P.Exh3 the bundle of invoices. I have painstakingly gone through all the invoices and I have found as follows:-

- (a) Invoice number 144365 and invoice number 144366 are for exactly the same amount, that is, Kshs. 516,422/= and are dated the same date. Those two invoices were not signed by the defendant nor by the plaintiff like the other invoices. Bearing that in mind, there is no evidence before court that the defendant was supplied with the products represented by those invoices.***
- (b) Invoice number 143472 for Kshs. 199,492/= was also not signed by the defendant. Again, the court cannot confirm the defendant received those products.***
- (c) Invoice number 143960 for Kshs. 405,053/= is not reflected in the plaintiff's account yet it is included in the bundle of invoices, that is, plaintiff's exhibit number 3.***
- (d) Invoice number 143960 for Kshs. 409,610/= is a similar invoice number to (c) above. It is also not reflected in the plaintiff's account.***
- (e) Invoice number 144122 for Kshs. 459,366/= is not signed by anyone. It cannot therefore be confirmed if the defendant received those products.***
- (f) Invoice number 144900 for Kshs. 496,115/= is reflected in the account but it is also not signed by the defendant or anyone else. Against, the court cannot confirm if the defendant received those products.***
- (g) Invoice number 144913 for Kshs. 232,740/= is also not signed but is reflected in the plaintiff account.***
- (h) The following invoices are reflected in the account but the invoices themselves are not in the bundle that was placed before court plaintiff's exhibit number three.***

- 143623 – Kshs. 11,025/=
- 144027 – Kshs. 410,278/=
- 144083 – Kshs. 5,100/=
- 144122 – Kshs. 459,366/=
- 144302 – Kshs. 431,709/=
- 144980 – Kshs. 155,603/=
- 14519 – Kshs. 496,115/=
- 145240 – Kshs. 518,678/=
- 145272 – Kshs. 658,339/=
- 145369 – Kshs. 518,676/=
- 145452 – Kshs. 532,169/=
- 145518 – Kshs. 496,115/=

Kshs. 4,693,173/=

As can be seen from those invoices, the total amount of the same is beyond the amount the plaintiff claims against the defendant. The invoices were not placed before court whilst others were not signed by anyone. The court therefore cannot confirm whether those products were delivered to the defendant. It is because of those discrepancies that I find and hold that the defendant had no case to meet or to defend. The plaintiff presented a very poor case. The plaintiff's case was one of accounts as can be seen from what is stated before. Those accounts did not balance and therefore did not raise a case on a balance of probability for this court to consider. The plaintiff was sloppy in presentation of its case. Not only did the plaintiff produce an agreement that had not been pleaded in the plaint but also failed to produce invoices reflected in its own accounts. The plaintiff's company also seems to have had a very poor system of checking on products supplied to its customers. As it can be seen in this case, the plaintiff was unable to confirm who received the products which the defendant is now required to pay for. I find that the plaintiff's case fails and the same is hereby dismissed and the costs thereof are awarded to the defendant.

Dated and delivered at Meru this 22nd day of October 2010.

MARY KASANGO

JUDGE