



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 253 of 2006

WILEX GmbHPLAINTIFF

VERSUS

AFRO FOREX BUREAU LIMITED.....DEFENDANT

J U D G M E N T

The Plaintiff has sued the Defendant for special damages in the sum of Euros 7,218.53 or its equivalent in Kenya Shillings, at the exchange rate of Kshs.90.1 to the Euro. The facts of the case are that the Plaintiff, which is an importer/exporter and supplier of equipment and spare parts for German made Mercedes Benz lorries and trucks approached the Defendant Forex Bureau on several occasions for Telegraphic Transfer Services. It is the Plaintiff’s case that the Defendant faithfully rendered the services on several occasions between September, 2004 and March 2006. The Plaintiff claims that on 22nd January, 2005, it requested the Defendant to Transfer to its German account in Euros, the equivalent of Kshs.500,000/-. The Plaintiff contends that the said sum had been issued to the Plaintiff by Pyramid Hauliers for equipment which the Plaintiff was expected to deliver them within six weeks from 26th January, 2006. The Plaintiff claims that the Defendant, in breach of their contract failed to transfer the funds to Germany leading to cancellation of the order and all other business transactions the Plaintiff had with Pyramid Hauliers. The Plaintiff claims for loss of profits in sum of Euros 5000 and for the balance of amount in the Plaintiffs account with Pyramid Hauliers in the sum of Euros 2,218.53. It also claims for general damages for loss of goodwill which the Plaintiff claimed in paragraph 14 of the Amended Plaintiff but which was not pleaded in the prayers in the plaintiff.

The Defendant in its amended defence has denied that it was ever approached by the Plaintiff to transfer by way of telegraphic transfer, Euros to the equivalent of Kshs.500,000/-. It further denies that Ms. Najma confirmed to the Plaintiff through Al Fayaz that the purported transactions had been successfully completed as claimed by the Plaintiff, and contends that at the material time, vide a Central Bank of Kenya circular dated 2nd December 2005, the Defendant was precluded from offering Telegraphic Transfer Services unless it obtained leave from Central Bank. The defendant denies occasioning any loss in profits, business dealings and reputation by any breach of contract.

Each of the parties called a witness to support its respective case. The fact that the Plaintiffs’ Al Fayaz gave Kshs.500,000/= to the Defendant’s Ms Najma is not denied. The Defendant however contends that the money was given for purchase of US Dollars if the circular by Central Bank of Kenya was not withdrawn.

The Plaintiffs list of issues was filed on 30th May, 2008 and contained nine issues as follows:

1. Did the Plaintiff deposit with the Defendant amounts together with blank Cheques and request and/or instruct the Defendant to transfer by telegraphic services Euros as hereunder:

Date paid	Amount (Euros)
a. 27/09/04	5,035.35
b. 21/06/05	7,420.00

- c. 05/12/05 5,932.00
- d. 20/03/06 4,520.00

2. **If the answer to paragraph 1 above is in the affirmative, did the Defendant on all the occasions offer telegraphic transfer services, deduct its fees/commissions from the amount deposited and/or notify the Plaintiff and issue the Plaintiff for its records, the transfer transaction receipts?**
3. **Did the Plaintiff on the 22nd day of January 2006 approach the defendant for the telegraphic transfer to its German account in Euros the equivalent of Kshs.500,000/- in line with the Plaintiff's business operations?**
4. **Did the Defendant misrepresent to the Plaintiff that the transfer of the equivalent of Euros on the said Cheque of Kshs.500,000/- to the Plaintiff's German account had been successfully completed?**
5. **Has the Defendant breached its contract?**
6. **Whether or not the Defendant's breach of the contract has occasioned loss to the Plaintiff?**
7. **Whether the Defendant can rely on the circular from the Central Bank of Kenya 2nd December 2005 precluding it from offering telegraphic transfer service on behalf of its clients unless there was an approval by the Central Bank of Kenya to avoid its contractual obligations?**
8. **Is the Defendant liable to pay the Plaintiff the sum of euros 7,218.53 or equivalent of Kshs.657,571/- at the exchange rate of 90.1 to the euro or any other sum or at all together with interest thereon as prayed in the Plaint?**
9. **Who should pay the costs of this suit?**

The Defendants list was filed on 31st October 2008 and contained seven issues as follows:

1. **Whether the Defendant offered telegraphic transfers to the Plaintiff as pleaded in paragraph 7 of its amended plaint.**
2. **Whether the Defendant was approached by the Plaintiff to transfer by telegraphic transfer Euros equivalent of Kshs.500,000 to its German account.**
3. **Whether the Defendant was offering telegraphic transfers services.**
4. **Whether there existed a contract between the Defendant and the Plaintiff.**
5. **Whether there was a breach of contract between the Defendant and the Plaintiff.**
6. **Whether the Defendant held a bank account with the Plaintiff.**
7. **Whether the Plaintiff is entitled to special damages as pleaded in paragraph 14A of its amended plaint.**

The issues filed by either of the parties are in essence similar, addressing the same issue. I have considered these issues. I have also considered the rival arguments and submissions by the counsels together with the evidence that was adduced by each party. Having considered all these, the following is my view of the matter.

It is clear from the evidence of both parties that the Plaintiff on several occasions through its employee or agent Al Fayaz approached the Defendant Company for telegraphic transfer services of money to Germany. It is also clear from the evidence of both parties that Al Fayaz mostly dealt with Najma, who was the Defendant's witness. It is not disputed therefore that the Defendant Company had on several occasions, that is between 2004 and 2006, given the Plaintiff telegraphic transfer services. Indeed the Plaintiff has adduced in evidence Statements of its Bank Account in Germany reflecting the transfers into that bank by the Defendant. The bone of contention is whether Al Fayaz, on behalf of the Plaintiff, at the time that he gave the Kshs.500,000/- to Najma entered into a contract with the Defendant for the equivalent of that money in foreign currency to be transferred telegraphically to Germany. It was Al Fayaz's evidence, that at the time he gave the money to Najma, it was their agreement that the money would be wired to Germany as the Defendant Company had done for the Plaintiff in the past. Al Fayaz testified that after leaving that money with Najma the Defendant confirmed to him severally that the money had been sent. He continued to testify that it was only after

their client who had paid that money to the Plaintiff informed him that it had not received the spare parts it had ordered from them, that he learnt from their Germany office that the money had not been received.

The Defendant has denied that it ever contracted with the Plaintiff to send the Kshs. 500,000 to Germany. Najma in her evidence stated that when Al Fayaz gave her the said sum, she made it clear to him that the Defendant Company was no longer allowed by Central Bank to send money through telegraphic transfers. Najma testified that she made it very clear to Al Fayaz that the money would not be sent and she denied confirming that the Defendant Company had transferred the money to Germany. Pressed further to explain why she was left holding the money, Najma testified that Al Fayaz asked her to keep the money in case the Central Bank withdrew the prohibition and that if it never did, that Najma should buy for him the equivalent in US dollars.

Regarding the issue whether the Defendant could rely on the Central Bank of Kenya circular, the answer is in the negative. The circular was not pleaded in the defence neither was the circular in the Defendant's list of exhibits.

I do find that the Defendant has not denied that it received Kshs.500,000/- from the Plaintiff. The Defendant's explanation as to why its employee Najma was left with the money by Al Fayaz is untenable. It is not reasonable that such a large sum of money could have been left with Najma to hold. I do not accept that explanation. I do not also accept the explanation that Al Fayaz had requested Najma to purchase for him the equivalent in US dollars. I find that also untenable. It would have been different if Najma bought the US dollars as that would be conclusive proof that their agreement was that if the circular was not withdrawn, the Najma should buy the dollars. Now that she did not buy the US dollars but held on to the money between January 2006 and April 2006, until the time when the Plaintiff took up the matter with the Defendant through their Advocates.

I do find that there was an agreement between the parties that the Defendant would offer telegraphic transfer services to the Plaintiff. I also find that on the 22nd January, 2006 when Kshs.500,000/- was deposited with Najma, which is not denied, the parties entered into an oral agreement that the Defendant would provide telegraphic transfer services to the Plaintiff by sending the equivalent of the said sum less their charges, to their German account. I do find that the Defendant failed, refused or neglected to offer the said services to the Plaintiff in breach of their said agreement.

The Defendant has since refunded the kshs.500,000/- to the Plaintiff and therefore the Plaintiff is not claiming a refund of the said sum. The Plaintiff is claiming special damages in the sum of Euros 7,218.53 or its equivalent in Kenya Shillings, for loss of profits and the balance of the amount in its account with Pyramid Hauliers. The Plaintiff adduced evidence to show that as a result of the Defendant's failure to transfer the said sum to its German Account, Pyramid Hauliers, who were the Plaintiff's customers and who had paid this sum to the Plaintiff for various spare parts, cancelled all its contract with the Plaintiff and returned a diagnostic machine they had earlier ordered. It's the Plaintiff's case that due to the Defendant's breach the Plaintiff lost its business dealing and that its reputation was dented to its detriment. Al Fayaz for the Plaintiff explained that as a result of the cancellation of the contract and the return of the machine, the Plaintiff lost profits in the sum of Euros 5,000 and an outstanding balance in the sum of Euros 2,218.53. Al Fayaz produced the invoices and delivery notes they issued to Pyramid Hauliers in support of this claim. The issue is whether the Plaintiff can claim the loss of profits and that outstanding sum from the Defendant.

The Plaintiff claimed general damages for the loss of Goodwill at paragraph 14 of the Amended Plaintiff but that was not included in the prayers and therefore the court cannot grant it. As for the special damages for loss, Mr. Njoroge for the Plaintiff relied on two authorities, the case of **BANK OF BARODA (K) LIMITED VS. TIMWOOD PRODUCTS LIMITED, NBI Civil Appeal No. 132 of 2001, [2008] e KLR** and **ODDS JOBS vs. MUBIA [1970] EA. 476**. Mr. Ojienda for the Defendant in response to that point submitted that time was not made of the essence by the parties and that therefore the Defendant cannot claim any loss from the contract between the parties. For this proposition Counsel relied on the case of **SAGOO vs. DOURADO [1983] KLR 365, quoted from 9 Halsbury's Laws(4th End)p 338 para 481 and cited in William Kazungu Chanzera Malindi HCCC No. 85 of 2001** (Unreported)

I have considered the cases cited by the counsels. In regard to Mr. Ojienda's submission, the Defendant has denied that it had any contract with the Plaintiff. The issue of time being of essence in a contract that has been denied by the Defendant is of no use to the Defendant. On the other hand I accepted the Plaintiffs' evidence that they made several calls to Ms. Najma regarding the money in question which makes it very clear that time was of the essence to the parties. While I agree with the principle in the cited case, **Sagoo supra**, I find that it is not applicable to the instant suit.

The cited case of **Bank of Baroda (K) Ltd.**, supra is a decision of the Court of Appeal and it is a ratio *decidendi* for the principle that a bank is liable to pay to its customer loss of profits occasioned by the dishonour of cheques. Being a Court of Appeal decision, I am bound by it. I find that it does apply to the instant case. Even though the Defendant is not a bank, it was providing financial services similar to Banking Services to the Plaintiff. The Plaintiff has shown that the Defendant breached its agreement with it, to transfer by telegraphic transfer the equivalent of Kshs.500,000/- to its Germany account the money was given in January, 2006. The Plaintiff has shown that it was only in March 2006 that it

discovered the money had not been sent despite numerous assurances that it had been done. The Plaintiff claims that that money had been given to it by its customers Pyramid Hauliers. There was no documentary evidence adduced to support Al Fayaz evidence that the money came from Pyramid Hauliers. The Plaintiff has however shown that Pyramid Hauliers, in disgust due to the Plaintiff's failure to supply it with spare parts ordered and paid for in January, cancelled a contract it had with the Plaintiff in May 2006.

I do accept the evidence of Al Fayaz that the money he gave to Najma to transfer to the German Account was paid to him by Pyramid Hauliers for the supply of spare parts. I am satisfied that the Plaintiff has been able to prove that there was a connection between the cancellation of its contract with Pyramid Hauliers and the Kshs.500,000 the Defendants failed to transfer to the German Account. The Plaintiff has sufficiently demonstrated that as a result of the Defendant's failure to transfer the sums of money to Germany it lost its business dealing and that its reputation was dented leading to a loss of profits. The Plaintiff has adduced invoices showing that it bought the diagnostic machine at a cost of Euros 1,478.15 and that it was going to sell it to Pyramid Hauliers at a cost of Euros 8,000. The sum being claimed by the Plaintiff is a direct loss of profit. It is not damages at large for loss of business, which in my view was also claimable. See **Bank of Baroda (K) Limited**, supra.

I am satisfied that the Plaintiff has proved its claim against the Defendant on a balance of probabilities. **I therefore enter judgment for the Plaintiff against the Defendant for special damages in the sum of Euros 7,218.53 with interest at court rates and costs of the suit.**

Dated at Nairobi, this 30th day of January, 2009.

LESIIT, J.

JUDGE

Read, signed and delivered, in the presence of:

Mr. Njoroge for the Plaintiff

Ms. Busienei holding brief Mr. Ojienda for the Defendant

LESIIT, J.

JUDGE

Order: Stay of execution for 30 days.

LESIIT, J.

JUDGE