



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

Civil Case 157 of 2005

TREADSETTERS TYRES LIMITED.....PLAINTIFF

VERSUS

COUNTRY MOTORS LIMITED.....DEFENDANT

J U D G M E N T

The Plaintiff, Treadsetters Tyres Limited is a Limited Liability Company carrying on the business of selling tyres and related accessories. The Defendant, Country Motors Limited, is a Limited Liability Company which also owned some premises in Kisumu. The Defendant let the premises to the Plaintiff. The Defendant company also carried out transportation business and for the purposes of this case, the Defendant's Chief Executive Officer, Mr. Pandhall, sought credit facilities from the Plaintiff company. In that regard the CEO filled a Credit Application Form which he also signed on behalf of the Defendant Company. The application was approved by the General Manager of the Plaintiff Company, Hano Oberhizzer and the Credit Manager, Mahul Gandaul by signing the Application Form. In the Application, the Defendant sought to be allowed to obtain tyres and accessories from the Plaintiff on credit of up to a maximum of Kshs. 2 million, payable within 60 days. The Plaintiff's case is that it did supply the Defendant goods and services in the year 2004. The Defendant issued it with a cheque for Kshs.4,601,986.64 in full and final payment of the debt. That cheque was however dishonoured upon presentment to the Bank. The Plaintiff filed this suit on 22nd March, 2005 seeking judgment in the said sum with interest at 16.75%, and costs of the suit.

There was an interlocutory judgment entered against the Defendant in default of the defence. That judgment was however set aside on application by the Defendant. A defence was filed on 3rd August, 2005 in which the Defendant denies being indebted to the Plaintiff. The Defendant avers that it was not supplied with tyres and accessories for the value claimed for in the plaint. However, the Defendant admitted issuing the cheque for Kshs.4,601,986.64 but avers that it issued it on the understanding that the cheque would be held as security, but was not to be banked. The Defendant avers that the balance of any amount due to the Plaintiff was settled in cash and in full.

The day the suit was to be heard, Mr. Gachoka for the Plaintiff came with the Plaintiff's sole witness. Mr. K'opot for the Defendant sent counsel, Mr. Odoyo to seek an adjournment on grounds he wished to file an application to cease acting for the Defendant. It was indicated that Mr. K'opot had received the hearing notice under protest. The application for adjournment was rejected but the court gave Mr. K'opot up to 12.20 p.m. to come for the hearing of the case. Counsel did not show up.

The Plaintiff called one witness Mr. Job Kubai Kihika. The witness testified that he was working for the

Plaintiff company between 6th February 2002 and February 2008, and that in 2008 he was the Plaintiff's Branch Manager at its Kisumu branch, where the cause of action arose.

Mr. Kihika produced the Application Form filled by Mr. Pandhall the C.E.O. of the Defendant company. The application sought credit of up to Kshs.2 million payable within 60 days, for the supply of tyres and accessories by the Plaintiff. That Application was approved by the General Manager and Credit Manager of the Plaintiff company. The Form is at page 103 of the Plaintiff's bundle of exhibits. It is dated 6th November 2003. Mr. Kihika produced the invoices for goods supplied to the Defendant by the Plaintiff on the Defendant's request at pages 1 to 95 of the Plaintiff's bundle of exhibits. The invoices bear the stamps and signatures of the Defendant company, indicating that the goods were received. Mr. Kihika also produced a statement summarizing all the invoices supplied to the Defendant and the sum due to the Plaintiff, at pages 96 to 100 of the Plaintiff's bundle. The sum due to the Plaintiff as per the summary is Kshs.4,601,986.64. Mr. Kihika testified that the summary was as a result of reconciliation of the Defendant's account with it carried out between both parties.

Mr. Kihika also produced credit notes issued to the Defendant. They are in the Plaintiff's supplementary list of exhibits. Mr. Kihika testified that after reconciling the invoices, the credit notes and the Defendant's account with the Plaintiff, the Defendant issued the Plaintiff with a cheque No. 288543, dated 31st December 2004, for Kshs.4,601,986.60; which was the full sum due to the Plaintiff from the Defendant. Mr. Kihika testified that the said cheque, a copy of which is page 101 in the Plaintiff's bundle of exhibit I, was dishonoured with remarks "refer to drawer". The witness testified that he personally went to Mr. Pandhall and informed him of the dishonoured cheque. Mr. Kihika testified that Mr. Pandhall made several promises to replace the cheque and to pay the sum owed, all which were not honoured. That on 10th February, 2005 through its advocates, the Plaintiff made a formal written demand for the payment of the debt. The letter of demand is at page 102 of Plaintiff's bundle of exhibits, and is dated 1st February 2005. It is signed by the Plaintiff's current advocates on record in this case.

Mr. Kihika testified that despite the demand and the notice to sue, no payment has been made to date.

Mr. Gachoka put in written submissions which he highlighted before the court. I have considered the submissions. I have also considered the Plaintiff's case, and both pleadings filed by the parties in this case. There is also a statement of agreed issues, signed only for the Plaintiff, and filed in court on 12th March, 2007. The issues for determination as per the filed statement are eight namely:

1 Did the Plaintiff supply the Defendant with assorted tyres and related accessories worth Kshs.4,601,986.64?

2. Did the Defendant issue a cheque Number 288543 for kshs.4,6012,9986.64 which was dishonored upon presentation to the bank?

3. Did the Defendant issue cheque number 288543 as payment for the tyres and accessories supplied to it?

4. Was the Plaintiff indebted to the Defendant for Kshs.1,532,232.48 as unpaid rent and cost of office partitioning?

5. Did the Defendant pay any monies to the Plaintiff in cash for the tyres and other related accessories supplied to it?

6. Who pays the costs of this suit?

7. Was the Defendant served with a demand letter and notice of intention to sue?

8. Is the defendant entitled to amount of Kshs.1,532,232.48?

In regard to the first issue the Plaintiff's evidence that it supplied the Defendant with assorted tyres and accessories was fortified by copies of invoices issued to the Defendant by the Plaintiff for the said goods. The invoices were all duly stamped and signed by the Defendant. The signature and stamp of the Defendant on these invoices are proof of acknowledgement that the Plaintiff supplied the goods mentioned in the invoices to the Defendant. The Plaintiff fortified its case further by producing copies of credit notes issued by it to the Defendant on the same goods. The Plaintiff has also fortified its case by adducing in evidence a statement summarizing all the invoices, which statement was prepared after reconciliation of accounts by both the Plaintiff's and the Defendant's representatives. The dishonoured cheque issued to the Plaintiff by the Defendant was for the full amount stated in the statement of account produced by the Plaintiff in evidence. This evidence was uncontroverted. I find that on a balance of probabilities the Plaintiff has proved that it did supply the goods to the value of the sum now claimed in this case, to the Defendant.

In regard to the second and third issues, whether the cheque was issued to pay tyres and accessories and if it was dishonoured, the cheque is before the court together with the note the Bank wrote referring the Plaintiff to the drawer of the cheque. The cheque was dishonoured. The Defendant admits issuing the cheque to the Plaintiff. The Defendant's averment in the defence that the Plaintiff was not supposed to bank it has not been substantiated in evidence. It remains a mere allegation without proof.

On the fourth issue whether the Plaintiff was indebted to the Defendant in sum of Kshs.1,532,232.48 as rent and other office costs, no evidence has been adduced to support this allegation. In fact the Defendant's defence does not contain a counterclaim for this sum.

In regard to the fifth issue whether the Defendant paid any monies to the Plaintiff in cash for the tyres and accessories supplied to it. The issue is a little vague since from the evidence of Mr. Kihika, the Defendant was good at paying its debt for goods supplied to it by the Plaintiff in the year 2003. The Plaintiff's case is that it is only for various supplies made to the Defendant at its request in 2004 that the Defendant failed to pay. Those are the subject of this suit. In regard to the supplies in 2004, as per the invoices before the court, the Plaintiff has shown that it supplied the goods to the Defendant. The Plaintiff has shown that a cheque issued to pay the sum owed in full was returned unpaid. There is no evidence that the Defendant ever paid the sum in the dishonoured cheque up to the time this suit was filed in court. Neither is there any evidence of payment thereafter. I find that the Defendant has not paid the sum it owes to the Plaintiff to date.

The sixth issue regards costs. Who should pay the costs of the suit? Costs follow the events. Section 27(1) of the Civil Procedure Act gives the court discretion to award costs of and incidental to the suit, to the party it deems fit. In this case the Plaintiff should be paid the costs of the suit, having given a demand and notice of intention to sue to the Defendant before filing this suit, and subsequently for having succeeded in proving its case on a balance of probabilities.

The seventh issue has been covered in my findings of the sixth issue.

The last issue is whether the Defendant is entitled to Kshs.1,532,232.48. There is no claim for this sum in the filed statement of defence. I see mention of certain issues of set off between the parties implied in the ruling of Azangalala, J. in regard to the Plaintiff's application for summary judgment against the Defendant. That is as far as the matter goes. It is trite that parties are bound by their own pleadings. The Defendant's defence before me lays no claim in such sum and therefore it does not lie.

Having come to this conclusion, I enter judgement for the Plaintiff against the Defendant in the sum of kshs.4,601,986.64.

The Plaintiff will have interest at the rate pleaded of 16.75% from date of judgment until payment in full.

These are the orders of the court.

Dated at Nairobi, this 22nd day of May, 2009.

LESIIT, J.

JUDGE

Read, signed and delivered, in the presence of:

Kihangu holding brief Mr. Gachoka for the Plaintiff

N/A for Mr. Kihika for the Defendant

LESIIT, J.

JUDGE