REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 1785 of 2001

ELF OIL KENYA LIMITED…….……PLAINTIFF

VERSUS

HUNKER TRADING COMPANY LIMITED……..DEFENDANT

J U D G M E N T

By a plaint filed in court on 23rd November, 2001, the Plaintiff Company sued the Defendant Company to recover kshs.8,932,710/- being the sum due and owing to it for petroleum products delivered to the Defendant between September 1999 and October 2000. The plaint was amended by an Amended Plaint filed on 5th March, 2003 and the sum claimed was amended to read Kshs.10,548,780/-.

The Defendant has denied owing any sums to the Plaintiff. The Defendant also denied ever receiving from the Plaintiff a notice of intention to sue.

The issues in this case were agreed upon by both parties and filed on 30th July, 2004. The following issues are raised.

1. Did the plaintiff enter into an agreement with the defendant for supply of the petroleum products of its choice on diverse dates in September 1999 on credit of 30 days?

2. If the answer to the above is in the affirmative, did the defendant request for goods from the plaintiff between September 1999 and October 2000, and if so, were the said goods delivered to the defendant by the plaintiff?

3. If the answer to the issue (2) above is in the affirmative, what was the value of goods requested for by the defendant and supplied by the plaintiff, was Kshs.10,548,380?

4. Is the plaintiff entitled to a sum of Kshs.10,548,780 from the defendant or any sum at all?

5. Who should bear the costs of this suit?

The brief facts of this case are that the Plaintiff Company is wholly owned by Total (K) Limited, following a merger between the two companies which was Gazettted by the Minister for Finance in Gazette Notice No. 1424 signed on 28th February, 2001 and appearing in the Kenya Gazette of 9th March, 2001. Following the gazettement both companies entered into an Agreement in which Total (K) Limited

acquired all assets of the Plaintiff Company, and under the Agreement, was mandated to pursue all debts owed to the Plaintiff Company in the Plaintiff's name. The Agreement is dated 3rd June 2005 and is P. exhibit 2.

The facts of the Plaintiff's case are that the Plaintiff company begun trading with the Defendant Company, supplying it with diesel and kerosene products in September 1999. Initially the Defendant company paid on supply of the goods but that in time, owing to long time trade, between them, the Plaintiff gave the Defendant credit facilities. The Plaintiff produced invoices at pages 1 to 48 of Plaintiff's documents which show the details of products lifted from the Plaintiff's depot, by whom the truck carrying the products was driven, his identity card number, volume of the product, date of lifting and the value. The Plaintiff also produced a statement of the Defendant's account with it as P. exhibit 3, showing similar details and in addition reflecting payments made and the sum outstanding. This was at page 97 of the Plaintiff's bundle. It shows that the sum outstanding was Kshs.10,311,348/- as of 30th August, 2001. That is the sum claimed in this case.

The Plaintiff's evidence through its Senior Legal Manager Mr. Franklin Juma was that the Defendant made attempts to settle the sums outstanding. The first attempt was by two cheques, P. exhibit 6(a) and 6(b) in the sum of Kshs. 15,000/- and Kshs.695,754/- respectively, both issued by Rushmore Company Limited on 10th and 18th May 2000 respectively and both which were honoured. The subsequent attempt to pay the outstanding sums was by a cheque in the sum of Kshs. 6 million, dated 7th September 2000 and issued by Rushmore Company Limited. That cheque was dishonoured by the bank as per notification produced as P. exhibit 4(b). The cheque was never replaced despite demand in writing. Subsequent to the cheque of Kshs. 6 million, the Defendant issued three other cheques on 18th and 20th September, and 12th October 2000 totalling Kshs.9,441,000/-. These were honoured.

The Defendants case is that it paid for all the petroleum products obtained from the Plaintiff company in advance and not on credit facilities. The Defendant's witness, Richard Kuria, who was in charge of payments made by the Defendant company and of reconciliation of accounts among other duties, denied that the Defendant was indebted to the Plaintiff. It was his testimony that he raised Local Purchase Orders (LPO's) and a cheque of equal amount both signed by a Director. It was against the LPO and cheque that the products were lifted from the Plaintiff's depot against a Delivery Note signed and stamped by the Defendant. Mr. Kuria testified that since the Plaintiff's Statement of Account, P. exhibit 3, was not accompanied by a Delivery Note and an LPO duly signed and stamped, the statement was valueless.

In regard to the dishonoured cheque, Mr. Kuria acknowledged that the drawer of the cheque (P. exhibit 4A) was a sister company of the Defendant company sharing a co-director by name Mr. Jackson Kahungura Kariuki. He however denied that the Defendant company transacted any business on behalf of the Rushmore Company.

Both parties filed their submissions which were eventually highlighted in court. I have considered these submissions as well as the pleadings and evidence adduced by both parties. The issues raised by the parties can safely be considered as a whole.

The Plaintiff's case is that the total value of business transacted between the Plaintiff and the Defendant, between September 1999 and 30th August, 2000 was Kshs.403,167,013/30, out of which Kshs.392,846,665/75 was paid leaving the balance claimed of Kshs.10,031,358/15. The Defendant has not challenged the value of the transactions but has maintained just that it paid in advance for all products lifted from the Plaintiff and secondly that the Plaintiff claim as per the amended plaint was Kshs.10,548,780/- but that its witness contradicted this in evidence by claiming Kshs.10,031,358/15.

I find that there is no dispute that the Plaintiff and the Defendant had business dealings as evidenced in this case. There was no written Agreement between the parties and the parties seem to have transacted their business on mutual understanding. The Plaintiff has however produced invoices for products lifted from it by the Plaintiff together with a Statement of Account. Both show that there existed an

understanding between the two parties that the Defendant could lift products from the Plaintiff on credit. The Statement of Account clearly shows payments received against various debits and outstanding balances. The Plaintiff has also produced a Memorandum of Understanding signed by the Managing Directors of both the Plaintiff and the Defendant dated 10th May, 2000. In that Memorandum of Understanding, it was agreed as follows:

"***MEMORANDUM OF UNDERSTANDING***

Further to the meeting held in ELF offices between yourself, managing director & marketing manager of ELF OIL (K) LTD, the following was mutually agreed: -

(i) Hunkar Trading Co. Ltd. will settle the outstanding amount during the period between 23/08/99 & 03/11/99 totalling to Kshs.2,087,260.00 in three (3) equal installment of kshs.,695,754.00 each. The 1st such payment will be made on 16/05/00 followed by the other payments on 23/05/00 and 30/05/00 respectively.

(ii) The payment for the disputed invoice no. 991005021 amounting to Kshs.305,000.00 will be arranged as soon as the documents relating to the same are available.

(iii) ELF OIL (K) LTD will resume credit business with HUNKAR TRADING as soon as a schedule of payment for all outstanding amount has been agreed on.

(iv) The documents relating to invoice no. 990905004 & loading order no. 00906 which were being disputed have been attached for ease of reference.

FOR HUNKAR TRADING CO. LTD ELF OIL (K) LTD.

Mr. J. K. KARIUKI MR. PHILIPPE BOURGEOIS

MANAGING DIRECTOR MANAGING DIRECTOR

MR. BERNARD TALOUR

MARKETING MANAGER"

The above document is a clear proof that as of May 10, 2000 the Defendant had an outstanding amount owing to the Plaintiff and that the two parties were agreeing to "resume credit business" between them as soon as a schedule of payment for the outstanding amount was agreed upon.

I do find and hold that the Plaintiff and the Defendant companies did enter into an Agreement for supply of petroleum products on credit terms. I do find and hold that the Defendant not only requested for various products from the Plaintiff during the period in question, but lifted the products using its own transportation.

An issue has arisen as to whether the Plaintiff's Statement of Account produced as P. exhibit 3 was of any evidential value. Mr. Njuguna for the Defendant submitted that the Statement was of no value as it was not a Statement of Account as provided under section 37 of the Evidence Act.

Section 37 provides:

"***37 Entries in books of account regularly kept in the course of business are admissible whenever they refer to a matter into which the court has to inquire but such statements shall not alone be sufficient evidence to charge any person with liability."***

Counsel relied on the Court of Appeal case of **Five Continents vs. Mpata Investments CA No. 306 of 2000** where the Court stated:

"***The Plaintiff mainly relied on the accounts analysis to show the defendant's indebtedness. That account analysis was apparently prepared by the plaintiff for use in this suit. It is not itself a book of account regularly kept in the course of business. Even if it were such a statement it would not alone be sufficient evidence to charge the defendant with liability (see section 37 of the Evidence Act). It follows that the accounts analysis on which the Learned Judge relied on 'has no evidential value' "***

Mr. Khayega for the Plaintiff in response to the Defendant's Counsel urged the court to find that the Plaintiff had adduced other evidence to prove its case other than rely on the Statement of Account alone. Mr. Khayega also urged the court to find the cited case was distinguishable since the Court of Appeal was dealing with an appeal to set aside judgment entered summarily against the Defendant/Appellant.

I agree with submissions by Mr. Khayega that the cited case of **Five Continents**, supra, is distinguishable from this case as it was an appeal against summary judgment entered by the High Court. From the case itself it is clear that what the justices of appeal were saying was that even where a Statement of Account is regularly kept in the course of business, it could not alone be sufficient evidence to charge a Defendant with liability and that the issue of the Defendant's liability could only be resolved at the trial.

This court is doing exactly that, trying the case in order to resolve the dispute between the parties. Each party has had an opportunity to adduce its evidence to support its case. I have found sufficient proof both from the Statement of Account and the Memorandum of Understanding agreed between the parties that the Defendant had a credit facility with the Plaintiff. The Defendants evidence denying that the credit facility existed was not only untruthful but was evasive and dishonest. The Plaintiff has adduced evidence to show when the Defendant made payments for the credit accorded to it and the sum outstanding. That evidence has not been challenged by the Defendant. It was very easy for the Defendant to challenge the debt, for instance by adducing evidence of payment for the sums claimed. It has not done so. In fact the Defendant has not adduced any evidence of any payment it made to the Plaintiff. I do appreciate that the burden lies on the Plaintiff to prove its claim. Having proved its claim, that proof cannot be dislodged by a mere statement of denial by the Defendant's witness.

That leads me to the next issue in controversy which is the issue of the dishonoured cheques and whether it was a matter the court should consider as an issue between the parties.

Mr. Njuguna for the Defendant contends that the issue of the dishonoured cheque should be disregarded for reason Rushmore Company was not enjoined as a party to the suit, that the Plaintiff did not frame any pleading regarding payment of the Defendant's debt by Rushmore or of the dishonoured cheque and that therefore the court could not adjudicate on the issue. Mr. Njuguna relied on Order XIV which deals with Settlement of Issues and Determination of suit on issues of law or on issues Agreed Upon. Counsel also relied on the Court of Appeal decision in the case of **Pauline Wangechi vs. National Bank of Kenya, CA No. 64 of 2002** where the Court stated:

"***The law is now well settled in the case of*** *Galaxy Paints Co. Limited – vs. Falcon Guards Limited [2000] EA 385* ***this court stated:***

'***It is trite law and the provisions of Order XIV of the Civil Procedure Rules are clear that issues for determination in a suit generally flow from pleadings and unless the pleadings are amended in accordance with the provisions of Civil Procedure Rules the trial court by dint of the provisions of Order XX Rule 4 of the aforesaid rules may only pronounce judgment on the issues from the pleadings or such issue as the parties have framed for court's determination."***

Mr. Khayega in response urged the court to find that the dishonoured cheque was a question of evidence which could only be adduced at the trial stage under Order VI rule 3 of the Civil Procedure Rules. To that response Mr. Njuguna submitted that the Plaintiff could not rely on Order VI as it was supposed to plead the issue of the dishonoured cheque in its evidence.

Order VI rule 3 (1) and (2) stipulates as follows:

"***VI (3) (1) Subject to the provisions of this rule and rules 6, 7 and 8, every pleading shall contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, but not the evidence by which those facts are to be proved, and the statement be as brief as the nature of the case admits.***

(2) without prejudice to subrule(1), the effect of any document or the purport of any conversation referred to in the pleading shall, if material, be briefly stated, and the precise words of the document or conversation shall not be stated, except in so far as those words are themselves material."

At this stage it is important to distinguish between Order VI and Order XIV of the Civil Procedure Rules. Order VI deals with pleadings generally. Rule 3 to 10 under this order provides for matters which need to be pleaded both of law and of fact. Order XIV deals with issues for determination of the court, and who and when they can be framed. Mr. Njuguna raised issue with the plaint but relied on Order XIV instead of Order VI of the Civil Procedure Rules. If I understand him well, Mr. Njuguna's contention is that the issue of the dishonoured cheque ought first to have been pleaded (under Order VI) in order for the court to determine it. On the other hand, Mr. Khayega's position is that the fact of outstanding debt covered the issue of attempts made to pay the debt including the payment through a cheque issued by a third party.

The case of **Pauline Wangechi**, supra, gives a broader meaning and interpretation to the application of Order XIV of the Civil Procedure Rules. The Justices of Appeal clearly stated in that judgment that issues for determination generally flow from the pleadings or issues as framed by the parties for the court's determination. The justices of appeal did not stop there; they stated categorically that issues for determination could also arise in evidence. To put it their way as found at paragraph 3 of page 19…

"***The issue as to whether the Respondent was a party to the fraud was neither pleaded, framed for the court by the parties nor was it canvassed at the hearing and left to the court for decision. Indeed even before us, it was not specifically made a ground of appeal."***

The issues for determination can arise not only in the pleading and the agreed issues between the parties but also in evidence if canvassed at the trial. The issue of the dishonoured cheque was canvassed, and the Defendant had an opportunity to adduce any evidence it desired to counter that evidence. The fact that the signatory of the cheque was a common director of the Defendant company and Rushmore Company Limited, the company against which the dishonoured cheque was drawn, is instructive. I took note of the fact that he was available but was not called as a witness. The only inference I can make of it is that if called, his evidence would have been adverse to the Defendant's case.

In any event, even without the dishonoured cheque I am satisfied from the evidence of Mr. Juma together with the documentary evidence of invoices and the Statement of Account produced that the Plaintiff has on a balance of probabilities proved that the Defendant is indebted to it.

The final issue to determine is whether the Plaintiff is entitled to the sum claimed of Kshs.10,548,780/-. Clearly from Mr. Juma's evidence as supported by the Statement of Account and invoices, the sum outstanding on the Defendant's account with the Plaintiff was Kshs.10,031,358/15, which is a sum slightly lower than the one pleaded. It is the sum proved for which judgment can be proclaimed. In answer to the issue then, I am satisfied that the discrepancy between sum pleaded in the amended plaint and the one proved in the evidence adduced is merely arithmetic. It does not in any way create any doubt as to the propriety of the Plaintiff's claim. I find in favour of the Plaintiff that the sum proved in evidence is due and that the Plaintiff should get judgment in that sum.

On costs, the Plaintiff has not adduced any evidence to show it gave to the Defendant a demand notice and notice of intention to sue. The Defendant specifically denied receiving any demand from the Plaintiff. In view of that denial and the fact that the Plaintiff has adduced no evidence to controvert the same, the Plaintiff should not get any costs for this suit.

In conclusion;

1 I enter judgment for the Plaintiff against the Defendant in sum of Kshs.10,031,358/15 with interest at court rates from the date of filing suit until payment in full.

2.Each party will bear own costs.

Dated at Nairobi, this 26th day of June, 2009.

LESIIT, J.

JUDGE

Read, signed and delivered, in the presence of:

Mr. Gichuhi holding brief Mr. Khayega for the Plaintiff

Mr. Njuguna for the Defendant

Dated at Nairobi this 17th day of July, 2009

LESIIT, J.

JUDGE