



**FREDRICK MULUMBA t/a FREBA INVESTMENTS .....PLAINTIFF**

**VERSUS**

**NATIONAL CEREALS & PRODUCE BOARD .....DEFENDANT**

**JUDGMENT**

The plaintiff amended his plaint on 21/4/2005. The plaintiff pleads a contract he entered into with the defendant for the sale and shipment of white maize to the port of Mombasa at an agreed price and for an agreed shipment period. The plaintiff pleads that the said contract was breached by the defendant. Particulars of breach are set out namely;

- (a) The defendant failed, neglected and/or refused to open an irrevocable confirmed letter of credit within the stipulated shipping time but opened a defective letter of credit dated 27/8/2004 which was not confirmed;***
- (b) The defendant failed, neglected or refused to open an operative and valid letter of credit and instead, purported to open a further defective letter of credit dated 4/10/2004 outside the contract and shipping time whose terms were not consistent with other letters of credit terms contained herein;***
- (c) Defendant, despite being notified of the defects, failed, refused and/or neglected to effect amendments which would have cured the end defects;***
- (d) Defendant recalled the defective purported letters of credit on 17/11/2004 and procured their cancellation.***

The plaintiff therefore claims financial loss of USD1,878,060 together with interest at 12 % p.a. and costs. General damages, interest on costs.

The defendant filed defence and counterclaim for loss incurred and lost income totaling Kshs.62,820,718/25 and damages for breach of contract (claim for damages for breach, was withdrawn at the end). The parties have not agreed on the issues but in their respective written submissions, the plaintiff has set out 9 issues.

However, the defendant sees the issues as set out in the statement filed on 16/1/2006. It appears to me that the basis of the plaintiff's claim is clearly set out under paragraph 6 of the plaint and it is a good beginning to start by analyzing the same. The contract, the breach of which is complained of is exhibited at page 10 of defendant's bundle of documents. It is dated 17/8/2004. The seller is plaintiff who agreed to sell and ship white maize of metric tons 30,000 to the defendant at an agreed price of USD 190.00 per metric ton (in bulk) (C & F) free out basis to arrive at port of Mombasa within two weeks of letter of award of the tender.

On the same date the plaintiff wrote a letter asking for a price adjustment from the tendered USD 190 per metric ton to USD 233. This necessitated an addendum to the contract which was executed by parties on 24/8/2004. There was urgency in the execution of this contract and it is clear under Clause 4.1, the buyer was willing to take delivery even earlier. There was famine in the country and white maize was to

feed the hungry.

Terms of payment and other charges were spelt out under Clause 6.1 – payment by irrevocable/confirmed/sight letter(s) of credit to be established by buyers bankers namely; Kenya Commercial Bank Ltd. Clause 6.2 – all charges relating to the opening of the letter of credit within the boards (defendant) bankers (excluding confirmation charges of the letters of credit if any) shall be for the buyers account.

All charges relating to the opening of the letters of credit outside the boards bankers (including confirmation charges if any) shall be for the account of the seller. On the issue of the time and period of shipment, it is clear that the parties must have appreciated that it was not workable to ship within 2 weeks from the date of award.

Defendant wanted the delivery to be even earlier (before 2 weeks are over). This could not have happened because the complete contract was not ready until 24/8/2004 when the addendum was signed. However, the time for shipment was extended by consent of both parties and final date was placed on 23/9/2004, letter of credit was established. On 25/8/2004 the defendant instructed their bankers to issue the letter of credit which was to expire on 22/11/2004 payable at sight handling charges within KCB, payable by applicant and charges for handling outside KCB for beneficiary. Shipment was from South Africa to Mombasa latest 10/9/2004.

The evidence is that the seller (beneficiary) failed to pay confirmation charges as stipulated in the agreement. The details in the letter of credit is obtained from the plaintiffs pro forma invoice No.0101. The evidence on this issue was given by plaintiff himself. He produced the performance bond guaranteeing payment of 687,000 USD covering the good execution of sale of 30,000 metric tons of white maize at price of USD 229. He said letter of credit was opened on 27/8/2004 i.e. 12 days from date of contract.

It is to be noted that the contract was finalized on 24/8/2004 therefore his statement was untrue. He testified that the letter did not conform to the contract because it was not confirmed – item 49. The second letter of credit dated 5/10/2004 is exhibited. It was irrevocable and not transferable (without our confirmation) to Citi Bank N.A., New York to any South African port to conform with contract dated 17/8/2004. Pro forma invoice No.0101 dated 20/8/2004, certificate of origin South Africa Chamber of Commerce.

It was not confirmed and was not transferable. This evidence is misleading. It does not come from the defendants' bankers KCB. On page 46 the Citi Bank N.A. concludes:-

***“The notification is given for information purposes only and without responsibility on our part in accordance with the provisions of Article 12 of UCP 500.*”**

***Our formal advise may follow provided such classification is received from issuing bank.”***

At page 66 of plaintiff's bundle Citi Bank N.A. confirms as follows:-

***“Citi Bank New York special instructions have received the requisite clarifications from issuing bank by way of this amendment.*”**

***Our previous reference to Article 12 may now be disregarded.”***

***“Citi Bank N.A. New York confirms this letter of credit and hereby undertakes to honour all drafts and documents presented in strict compliance with the credit terms.”***

That was on 7/10/2004.

The plaintiff testified that he had to change suppliers because his first suppliers refused to deal on

unconfirmed letters of credit. However, it is to be noted that he had entered into contract to sell white maize only with the defendant, not plaintiff's suppliers. He then obtained other suppliers from Brazil. He said he had failed to supply the white maize because of inordinate delay in issuance of the letter of credit and that when it was issued it was defective as it was not confirmed and that the defendant failed to heed his request for amendments.

As far as the defendant was concerned, the contract was urgent that is why the contract was written "the seller shall endeavour to ship the maize earlier than the period of 2 weeks". However, the plaintiff called for amendment from the first date on 17/8/04 to change the price. The addendum was not signed until 24/8/04 and on 25/8/04, the defendant wrote to its bankers instructing for letters of credit to be issued in terms of the contract. Also shipment date was extended from time to time. The first letter of credit was cancelled and a new letter of credit was issued on 4/10/04 and the date of shipment shown as 25<sup>th</sup> October 2004. It was issued at the express request of the plaintiff from KCB to Citi Bank N.A. New York.

When the plaintiff sought for an increase of price the letter of credit could not have been issued until the increase was agreed upon. The first letter of credit was not confirmed and it would have been confirmed if the plaintiff had paid (which was his duty) for confirmation. He did not and cannot blame the defendant. He should have complied with Clause 6.2 of the contract.

PW1 said that the contract allowed for and whenever requests were made by the plaintiff, they were granted. Confirmation charges were by the plaintiff as provided under Clause 6.2. Payment of which charges the same could have been confirmed. The letter of credit was operative and workable and what he was to do is to pay through his bankers, Dubai Bank Kenya Ltd. the confirmation charges.

The letter of credit dated 27/8/2004 guaranteed the seller/plaintiff the payment of the price being USD 6,870,000. Therefore letter of credit could not be established until final agreement on price was made and as it is the plaintiff who sought increase of the price on same date the contract was signed he cannot blame the defendant for any delay. There was a request for amendment by the plaintiff by letter dated 6/9/2004. On the same date defendant instructed its bankers to amend by adding "Dubai Bank (K) Ltd. and endorsed in favour of ....." and the amendment was carried out.

On 21/9/2004, 2 days to last shipping date of 23/9/04, the plaintiff wrote to the defendant as follows:-

*"Dear sir*

**RE: CONTRACT FOR THE SUPPLY OF 30,000 METRIC TONS OF WHITE MAIZE**

***Thank you for your letter dated 20/9/2004 referenced IMP/MZI/1/2004-5.***

***Please note that we lost our original supplier due to the delay in the issuance of bank guarantee (Letter of Credit) by N.C.P.B. to our company and hence we have not been able to nominate the vessel. All these constraints have interfered with our original contractual obligations.***

***In the meantime we have appointed M/S Erad Suppliers & General Contracts Ltd. to act on our behalf and supply white maize to your firm since they have maize and their letter of credit has not been issued to them yet.***

***We appreciate the support that you have accorded to our firm Erad Suppliers & General Contracts shall include the latest date of shipping from the letter of credit date subject to the Bank Guarantee being received by 23<sup>rd</sup> September 2004 in favour of Erad Suppliers & General Contracts Ltd.***

***Attached find pro forma invoice from Erad Suppliers & Contracts Ltd.***

***Kindly expedite the process.***

*Yours faithfully*

**FREDRICK MULUMBA.”**

By above letter, it is clear the plaintiff was unable to perform the contract and has therefore resigned from his contract with defendant. At this stage the plaintiff did not raise issue of defect in the letter of credit. He just wanted to exchange his contract for that of Erad Suppliers. On 22/9/2004 one day before the last shipping date (23/9/2004) the plaintiff wrote to defendant without any reference to his letter of 21/9/04 asking for cancellation of the initial letter of credit dated 27/8/04 asking to be issued with a fresh letter of credit on ground:-

***“Our original supplier has since increased their price to unacceptable price we were forced to look for another supplier. We are pleased to inform you that we have now identified a supplier who we have completed negotiations to supply us as per our existing agreement ..... we request the Board (defendant) to:***

***(a) Cancel the existing letter of credit issued through Dubai bank Ltd.***

***(b) Re-issue a fresh letter of credit through our bankers KCB Ltd., Sarit Centre.***

Further:

***“We shall meet the costs of establishing the cancelled letter of credit incurred by the Board.”***

The plaintiff regretted the inconvenience caused to the defendant. The defendant instructed its bank to cancel the letter of credit and issue one on fresh terms on plaintiffs. See letter of 1/10/2004. A new confirmed letter of credit with latest shipment date extended to 25/10/2004.

On 5/10/04 the defendant wrote to plaintiff giving notice that:

***“Unless contracted consignment of 30,000 metric tons is received at the port of discharge in Mombasa on or before 15/11/2004, this contract will be forthwith be terminated for want of performance on your part.***

***Upon such termination you will be held liable to indemnify the Board for any expenses, loss, damages and costs that the Board has suffered as a consequence of your default.”***

On 11/11/04 the plaintiff asked for extension of letter of credit by 30 days. After receiving the E-mail from plaintiff and also from bank the defendant declined to extend time. It appeared that the plaintiff was not capable of performing its obligations under the contract.

Upon considering the above stated, it will be seen that the parties did waive strict compliance with the provisions from time to time. Shipping period was changed from time to time and letter of credit was also changed from time to time. 15<sup>th</sup> day of November 2004 was the last gazetted date for the importation of duty free maize by the government.

The plaintiff resigned from previous letter of credit, abandoned the contract by assigning it to Erad Suppliers & Contracts Ltd. Later the plaintiff requested and was granted a new letter of credit with new terms. He is estopped from claiming that the letter of credit dated 27/8/2004 was defective. Moreover, if there were any he waived his right to pursue suit since by accepting a new confirmed letter of credit with extension to 15/11/2004.

There are issues which are not disputed. The plaintiff did provide performance bond for 10% of the value of the maize to be supplied. The contract between the parties was amended as to price. The plaintiff points out that the period for shipping 2 weeks of letter of award of tender and that the defendant delayed the opening of letter of credit to enable the inportation of this an examination of the facts above

shows that the defendant was not guilty of delay. The delay was caused entirely by the plaintiff in his conduct on his part of contract. He requested amendments of the contract, the amendments of letter of credit, change of source of maize from time to time and the defendant obliged everytime. Though both parties were aware that time was of essence, delivery was never made by last shipping date namely 15/11/04.

The plaintiff was asking for extension for 30 days almost on the last date of delivery. I have read the pages relied upon by the plaintiff but I am of the view that the plaintiff was never able to execute the contract he made with defendant. Therefore, I have come to conclusion that the plaintiff has not proved on a balance of probabilities the particulars of breach set out under paragraph 6 (a-d) of the plaint namely;

- (a) That the defendant failed to open an irrevocable confirmed letter of credit within the stipulated shipping time. The letter of credit opened on 27/8/2004 was workable but not confirmed because the plaintiff failed to pay confirmation charges through its bankers;**
- (b) The defendant did open operative and valid letter of credit. The delay was caused by plaintiff and time was extended from time to time. The terms were always as given by the plaintiff in pro forma invoice and therefore if there was any defect it originated from the plaintiff;**
- (c) The defendant caused the alleged defects to be rectified whenever requested by the plaintiff;**
- (d) It was the plaintiff who requested for cancellation of letter of credit in exchange of new letter of credit which plaintiff requested to be extended for a further 30 days.**

This was the last straw and the defendant refused to give extension. It

is also clear that the plaintiff has not proved any loss or damage. It is trite law that no general damages are awardable in a case of breach of contract. The damages in a contract are special damages which must be pleaded and proved.

In the case of **Strows Broks Aktie Bolog vs. Hutchison [1905] AC 515** the court said:-

**“General damages are such as the law will presume to be direct, natural or probable consequences of the action complained of. Special damages on the other hand are such as the law will infer from the nature of the act. They do not follow in the ordinary course. They are exceptional in their character, they must be claimed specially and proved strictly.”**

In this case the plaintiff did not produce evidence that he could have earned profit USD 59 per ton had he shipped the maize. In the pro forma invoice although he had indicated suppliers, no price applicable was indicated. However, he indicated a pro forma from another supplier shown unit cost of USD 160 per metric ton dated 9/9/2004. He also produced sales and purchase contract between him and another Chizu Investments Corporation of Namibia showing USD 209 per metric ton dated October 2<sup>nd</sup> 2004.

On top of these prices the plaintiff was to pay freight up to Mombasa. These items would have reflected against his profits. The profit of USD 59 is not true figure and therefore its profits not proved. The loss of profit of USD 1,770,000 is not proved. Then there is claim of Bank commission on performance bond 13,740. Bank commission bid bond Kshs.13,500/=. Letter of credit charges to Citi Bank Kshs.13,500/=. Letter of transfer charges Kshs.80/=. Letter of credit charged by plaintiff's bank charges Kshs.27,000/= and miscellaneous expenses Kshs.40,000/=.

No receipts were produced. He produced bank statement showing certain debits which are not in consonance with the alleged claims. In the entire life of the plaintiff's account the plaintiff had deposited Kshs.220,000/= in this account. This could not have sufficed to pay all sums he claims. The plaintiff would have lost nothing but Kshs.220,000/= in his account.

In the plaintiff's letter dated 24/11/2004 the plaintiff informed the defendant:-

***“In the above circumstances, we solicit for your support and co-operation in extending us an opportunity to import the maize under the next duty free importation scheme.***

***Your approval will provide us adequate time to arrange the delivery of maize timely.”***

The plaintiff has realized he was incapable of supplying the maize and was requesting for another chance to be considered for another chance. Considering the defendant’s counter-claim as contained in the Re-amended statement of defence and counter-claim, the defendant claims expenses incurred, lost income and interest. (i) Anticipated earnings of government commissions on 30,000 tonnes of which maize:-

**Purchases - Kshs.28,333,333.00**

**Direct costs - Kshs.13,304,383.00**

**Fumigation - Kshs. 127,464.00**

**Storage - Kshs. 116,538.00**

**Release - Kshs. 5,666,666.00**

**Insurance - Kshs. 1,826,667.00**

**Charges on opening**

**Letter of credit - Kshs. 1,055,468.00**

**Amendment commissions Kshs. 4,500.00**

**Confirmation bank**

**Charges - Kshs. 1,451,219.25**

**Interest on the contract sum**

**between 27/8/2004 upto to 16/11/2004**

**at the rate of 6.5% p.a.**

**TOTAL Kshs.62,820,718.25**

As stated above the claim for damages by defendant is abandoned after counsel submitting that no general damages are awarded on the breach of contract. The proof of these figures are in evidence of the DW2. The defendant is an agent of government and it would have earned commission as stated and is paid commission for handling maize on behalf of government. The plaintiff’s failure to deliver the maize meant the anticipated Kshs.47,548,348/= was lost. There was existing agreement of agency between defendant and the government. The agreement had expired but the defendant continued to apply the rates set out and the government continued to pay at same rates.

Although DW2 testified that items (i), (iii) and (iv) are purely mathematical, one is left wondering if no maize was delivered was there any storage or fumigation required. These 2 items do not appear payable and I disallow them. Insurance payment was also demanded before government can issue import declaration and the letter of credit. It was taken in expectation of maize and was properly incurred being Kshs.1,826,667/= out of debit note of Kshs.2,582,581/=, credit note Kshs.755,904/=.

The sum appears proved. I also find proved amendment commission Kshs.1,055,468/= and

Kshs.4,500/= as indicated in defendant's exhibit No.3. Regarding Kshs.1,451,219.25 the bank debited this sum because the plaintiff refused to pay insisting that the letter of credit was defective as not being confirmed. The defendant's account was delisted. I find it proved.

There is a counter-claim of interest at the rate of 6.5% per annum for the period 27/8/2004 and 16/11/2004 amounting to Kshs.10,934,480/= being on the sum of USD6,870,000/=. The defendant parted with its money in favour of KCB Ltd. from 27/8/2004 to 16/11/2004. Money was not accessible pending payment to plaintiff upon completion of contract as it is the contract was never completed. For this reason the defendant is entitled to interest. It is claimed at the rate of 6.5% which is not unreasonable or excessive. The amount claimed as interest is awarded.

The upshot after considering all the above is that I find the plaintiff's case not proved on a balance of probabilities and the same is dismissed with costs to the defendant. The defendant's counter-claim is proved the plaintiff was guilty of breach of the contract. It never delivered the white maize as contracted. It is liable to the defendant for the loss incurred as a result of direct breach of the said contract.

However, I am not convinced that the claim for fumigation and storage was proved. The delivery was at Mombasa Port but the maize never reached anywhere near. Therefore the sum of Kshs.244,076/= is not allowed. Judgment is entered for defendant against the plaintiff in the sum of Kshs.62,576,642/25 plus interest at court rates until payment in full. The defendant is awarded costs of this suit.

Orders accordingly.

**DATED, SIGNED and DELIVERED** at Nairobi this 22<sup>nd</sup> day of October 2009.

**JOYCE N. KHAMINWA**

**JUDGE**