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

Civil Suit 575 of 2000

1. STOKMAN ROZEN KENYA LIMITED…… ……1st PLAINTIFF

2. STOKMAN ROZEN BV……2ND PLAINTIFF

VERSUS

NJAGU LIMITED……..……..……..…DEFENDANT

J U D G M E N T

The Plaintiffs in this case have by an amended plaint dated 31st October, 2006, and filed under courts order of 4th July, 2007, sued the Defendant company for a sum of Euros 43,600.80, being the outstanding balance of sums due to the Plaintiffs on account of supply of rose plants to the defendant at its request. The suit was filed on the 30th March 2000. The 1st Plaintiff is a limited liability company incorporated in Kenya while the 2nd Plaintiff is the parent company incorporated in Holland. The Plaintiffs claim is that the 2nd Defendant supplied roses to the defendant at its request and instance at various items. That by 24th March 1998, the amount due to the 2nd Plaintiff was DFL 149,500 which the Defendant agreed to pay to the 1st Plaintiff by an agreement made on 24th March, 1998. The agreement is Plaintiff exhibit 19.

The Plaintiffs aver that upon demand being made for the payment of the said sum, the Defendant through its Advocates letters dated 26th August, 1998 and 12th January, 1999 duly acknowledged being indebted to the Plaintiffs and endeavoured to settle the amounts due. The Advocate aforementioned letters were exhibits 9 to 16.

The Plaintiffs aver that he Defendant is liable to either the 1st Plaintiff or the 2nd Plaintiff or to both of them jointly.

The Plaintiffs aver that the Defendants debt to them was converted from Dutch Guilder to Euros at an international conversion rate of 2.20371 to Euros 43,600.80. The Plaintiffs claim the said sum or the equivalent in Kenya Shillings together with interest thereon at 1% per month from 24th March 1998 to date of judgment and thereafter at court rates to date of full payment together with costs of the suit.

The Defendant filed a defence against the Plaintiffs' claim on the 3rd May 2000. The Defendant denied the Plaintiffs claim and avers that it has never been supplied with roses by the Plaintiff at its request,

instance or otherwise and was not indebted to the Plaintiffs as alleged. It also avers that it never directly or through its Advocates, admit liability to the Plaintiffs as alleged.

In the alternative and without prejudice the Defendant avers that the Plaintiffs not being a financial institution and in the absence of a lawfully binding agreement has no sustainable basis upon which it can charge interest and secondly the rate of interest claimed is arbitrary excessive, punitive and or otherwise unconscionable.

After the Plaintiffs amended the plaint, introducing the 2nd Plaintiff to the suit, the Defendant filed an amended defence. In that amended defence, the Defendant reiterated the initial defence by including the 2nd Plaintiff and denying each allegation in the amended plaint. There is a new paragraph to the amended defence, which is paragraph 5A. In that paragraph the Defendant pleads that the claim by the 2nd Plaintiff was time barred due to the effluxion of time and was therefore an abuse of court process.

The Plaintiffs called one witness, the Chief Accountant and Human Resources Manager of the 1st Plaintiff who testified concerning the Defendant's debt to both Plaintiffs. The Defendant called no evidence. The Plaintiffs witness Mr. Cheboss, informed the court that the 2nd Plaintiff owned shares in the 1st Plaintiff's company and that both companies shared directors, one Herman Stokman and Erick Stokman. He informed the court that he obtained all the information concerning the debt from the Plaintiffs' books and records which are maintained by him in the course of his duty. The witness produced several documents as exhibits in support of the Plaintiffs' case. Mr. Cheboss informed the court that the Plaintiffs' company's principle business was rose promulgation and sale of seedlings to farmers. Mr. Cheboss informed the court that the Plaintiff companies sold rose bushes to the Defendant in 1995 and 1996 on its request. Mr. Cheboss testified that the first sale was of 28,000 bushes of Rose Serenade Plants, which were imported by the 2nd Plaintiff from Holland and delivered to the Defendant. The second sale was for first Red Naivasha of 30,000 stems sold to the Defendant by the 1st Plaintiff. The witness testified that two invoices were raised for these sales. Mr. Cheboss identified Plaintiff exhibit 2(a) and (b) as the delivery note and packing list for 57 boxes of First Red from the 1st Defendant to the Defendant. The witness also identified and produced Plaintiff exhibit 3(a) a Plant Information Permit issued to the Defendant Company for importation of 30,000 Red Serenade Plants from Holland dated 14th June 1995. He also identified Plaintiff exhibit 3(b) a letter from the Defendant to the 2nd Plaintiff informing it that it had received the importation permit and the Veritas inspection documents from the Kenya Government for the importation of the flowers. The information permit is Plaintiff exhibit 3(a) while the Veritas Inspection was Plaintiff exhibit 3(c). Mr. Cheboss identified Plaintiff exhibit 3(d) the Phytosanitary Certificate for the importation of 28,000 rose stems. He also identified an Air Waybill dated 19th September, 1995, Plaintiff exhibit 5 which was proof that the Rose Plants Serenade, weighing 945kgs. Were airlifted from Holland by the 2nd Plaintiff, to Kenya to the Defendant.

Mr. Cheboss identified Plaintiff exhibit 4, a handwritten note from the Defendant to the 1st Plaintiff requesting for the prices of First Red Naivasha Roses dated 8th August, 1995. The witness also identified a fax copy of hand written note by the Defendant to the 2nd Plaintiff dated 5th December, 1995 informing Herman Stockman that the Red Serenade was doing well and thanking him for the offer of 30000 stems, First Red at Naivasha which, the fax stated, the Defendant was ready to plant. The fax also refers to payments and makes a request that similar terms as those given in the previous sale be applied.

Mr. Cheboss proceeded to identify and produce as exhibits various correspondences between the Plaintiffs' Advocates and the Defendant's Advocates concerning the outstanding debt. The letters are dated between 8th July 1998 to 12th January 1999 and as Plaintiff exhibits 9 to 16.

I will refer to few notable correspondences among them Plaintiff exhibit 11 which is a letter from Muhoho & Associates, the Defendant's Advocate, to Waruhiu & Muite Advocates, the Plaintiff's' Advocates dated 26th August, 1998. In it the Defendant's Advocate states in part as follows: -

1. Our client and yours had entered into an agreement (copy enclosed) wherein it had been agreed that the debt due to your client would be offset from the 50% of the sale proceeds of the flowers sold by our client.

2. Our client (and yours is aware of this) has not been able to sell flowers as they are currently off season and as such our client has not received income from the sale of flowers since May 1998.

3. Our client is committed to the agreement under reference between him and your client and would like to assure your client that the repayment will resume in or about October 1998 when the flower markets re-open.

This letter is a clear admission that the Defendant owes the Plaintiffs an outstanding debt and is an assurance that the Defendant is committed to repaying the debt.

The letter dated 19th October, 1998, Plaintiff Exhibit 12 by the Plaintiff's Advocate to the Defendant's Advocate referenced "Debt owed to Stokman Rozen Kenya Limited – 138,785.72 DUTCH GUILDERS – NJAGU LIMITED & P. G. MUHOHO". It states in part as follows:

"*Please refer to our letter of 15th September, 1998 and let us have a reply thereto.*

in view of your silence for the past one month, we assume that your client has started making the payment, with a view to completing by 18th December, 1998. Please confirm by return to enable us to advise our client on the next course of action. May we please hear from you by Friday 30th October, 1998"

This letter is a clear indication that negotiations for the payment of the debt had been made between the two parties. The letter expresses the arrangement acceptable to the Plaintiffs and the terms upon which it had been accepted. The letter dated 12th January, 1999 from the Defendant's Advocate to the Plaintiff's Advocate states in part as follows: -

"*Please note that under instructions from our client, our client's bank made a direct payment of Dutch Guilders 6,438.94 on 9 November 1998 towards repayment fo the amount owed by our client to yours."*

This letter shows that the Defendant had made a payment of 6,438.94 Dutch Guilders, through direct credit by the Defendant's bank on the 9th November, 1999 towards the payment of the debt.

Plaintiff exhibit 8 is the Defendant's statement of Account held by the 1st Plaintiff. It reflects several payments. On 9th November, 1999, there is a credit payment of 6,438.94. Mr. Cheboss testified that the said credit is the same reflected in the Defendant's advocate's letter to the Plaintiffs' Advocate dated 12th January, 1999. Mr. Cheboss stated that other payments are rejected with the last credit being the one dated 20th May 1999 of 4000 Dutch Guilders. Mr. Cheboss stated that the Statements of Accounts reflected payments received in installments from the Defendant by the 1st Plaintiff and the outstanding balance on the account. The balance on the account as of 20th May, 1999 is 96,083.52. This sum is the one claimed in the Plaintiffs' amended plaint at paragraph 7. At paragraph 8 of plaint, it is pleaded that the Dutch Guilders was converted to the Euro at an international conversion rate of 2.20371 bringing the sum claimed from Dutch Guilders 96,083.52 to Euros 43,600.80. The latter is the sum claimed in the prayers under the Plaint. Mr. Cheboss, the sole Plaintiff's witness testified to the rates of conversion from the Dutch Guilders to the Euros. Mr. Cheboss stated that in the year 2000 is when the conversions were made, when Holland, as most European countries adopted the Euros as their sole currency and Dutch Guilders ceased to be legal tender.

The evidence of the Plaintiffs' witness is very clear and is considered. I also considered the submissions by Counsel and cases relied upon.

For as start I must mention that since the Defendant called no witness, its defence remained unsubstantiated. More important, the Plaintiffs' evidence remained unchallenged.

I will deal with the issues arising from the evidence, pleadings and submissions by Counsel as no agreed issues seem to have been filed. The first issue is that the Plaintiffs' suit being time barred as pleaded in the amended defence.

As stated, the Defendant has raised the issue of the Plaintiffs' suit being time barred at paragraph 5A of the amended defence.

Mr. Kimani for the Defendant submitted that since the amended plaint introduced the 2nd Plaintiff as the party which delivered and sold the rose plants to the Defendant, then the 2nd Plaintiff came to the suit in 2007 by which time the claim was time barred. Counsel contended that since the letter of 12th January, 1999 referred to in the amended plaint was not produced in evidence, then there was no evidence that the Defendant acknowledged its indebtedness to the Plaintiffs. The Counsel's submission that the letter was not produced in evidence is incorrect. The letter was Plaintiff exhibit 12. Not only was it an exhibit, much more, it stated that the Defendant acknowledged its indebtedness to the Plaintiff and made a payment by direct credit through its bank on 9th November 1999. The Defendant's statement of Account with the Plaintiffs is Plaintiff exhibit 8 and confirms the payment together with several other payments to the Plaintiffs.

Mr. Kimani contended that the correspondences exhibited in court were between the Plaintiff(s) and one Paul Gatheche Muhoho but were never between the Plaintiff(s) and the Defendant Company. Mr. Kimani submitted that the Defendant was not mentioned in any of the correspondences.

Mr. Kimani is being less than candid in his submissions. All the correspondences marked Plaintiff exhibits 12, 13, 14 and 16 have as part of the Reference: *"DEBT OWED TO STOKMAN ROZEN KENYA LIMITED BY NJAGU LIMTIED & P. G. MUHOHO"*.

Not only is the Defendant Company expressly mentioned in the letters written by the Plaintiffs' Advocate but in those written by the Defendant's Advocate as well. Nowhere did the Advocate complain that the Plaintiffs were unclear of who their debtor was.

The documents marked Plaintiff exhibits 9 and 10 are from Waruhiu Advocate and are addressed to

"Paul G. Muhoho Esq. Njagu Limited…"

Both these letters are demands for payments. They are the very first letters written to the Defendant by the Plaintiff's Advocate and are both dated July 1998.

In addition, the correspondences requesting for the supply of the rose plants are addressed to the 1st and 2nd Plaintiffs respectively for the two supplies in issue on the letterheads of the Defendant Company.

Mr. Kimani's submission that the Defendant was owed to a person and not the Defendant Company is misleading and incorrect.

Mr. Kaburu for the Plaintiffs submitted, as pleaded in the reply to the amended defence, that that Defendant's contention that the suit is time barred due to limitation was *res judicata*. Mr. Kaburu submitted that Warsame, J. dealt with it at the time he allowed the Plaintiffs to amend their Plaint.

Mr. Kimani, in response submitted that in Justice Warsame's ruling that the prejudice occasioned to the Defendant by the amendment could adequately be compensated by an award of damages. The learned Judge therefore allowed the amendment and ordered the "*2nd Plaintiff to pay costs of Kshs.3000/- tot eh Defendant for any prejudice it may suffer*." the effect of the ruling was to settle the issue of limitation and in my view, the only option available to the Defendant was to appeal against the ruling. To demonstrate

Order VIA Rule 3(5) provides:

"*O.VIA r.3(5) An amendment may be allowed under subrule (2) notwithstanding that its effect will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the suit by the party applying for leave to make the amendment.*"

I quote from Mulla on the Code of Civil Procedure Vol. – 11 page 1843, English case of Leach & Co. Limited vs. Messrs Jardine Skenner & Co. [1957] 5 CR 595

"*It is no doubt true that courts would, as a rule decline to allow amendments, if a fresh suit on the amended claim would be barred by limitation on the date of the application. But that is a factor to be taken into account in exercise of the discretion as to whether amendment should be ordered, and does not affect the power of the court to ruder it, if that is required in the interests of justice. And the same was again laid down in Pirgonda Hongonda v Halgonda Shidgonda. But the Supreme Court has cautioned that such a wide power has to be exercised in accordance with judicial considerations. The wider the discretion, the grater ought to be the care and circumspection on the part of the court. No amendment should be allowed which amounts to row results in defeating a legal right accruing to the opposite party on account of lapse of time.*"

For completeness, this is a claim in contract. Under Section 4(2) of Limitation of Actions Act, the limitation period is six (6) years. The rose plants in issue in this case were provided in 1995 and 1996. It is also trite that the limitation period is renewed once payment is made on an outstanding debt and starts working from the date of payment. In this case the limitation period ended in 2001 and 2002 respectively. The suit was filed within time. Taking into consideration the Defendant's statement of Account, Plaintiff exhibit 8, the last payment made on the date was made on 20th May 1999. That reviewed the limitation period extending it to 2005. By the time the plaint was amended, the 2nd Plaintiff claimed was 2 years late. That is not inordinate and may explain Judge Warsame's decision to allow amendment under Order VIA rule 3(5).

Mr. Kimani has raised the issue of *locus standi* of both Plaintiffs. Counsel submitted that since the Plaintiffs' cases were commenced without approval through a resolution under seal of either the Directors or the Shareholders, and failing that without ratification by the said Plaintiffs companies, the suit was a nullity. Counsel relied on the text Phipson on Evidence (16th Edn.), Bugerere Coffee Growers Limited vs. Sebaduka & Anor. [1970] EA 147 and Bunson Travel Service Limited & Others vs. Kenya Airways Limited HCCC No. 304 of 2004 for that preposition. I have considered each of these cases.

Mr. Kaburu in response has urged the court to note that the issue of *locus standi* was not pleaded to and should not be considered, as issues to a case should arise from pleadings.

I agree with Mr. Kaburu. A party is bound by its pleadings and further more it cannot be allowed to rely on issues that were never pleaded nor made an issue by the parties.

Mr. Kaburu has also urged the court to consider the affidavit supporting the application to amend the plaint, sworn by Herman Stokman, one of the Directors and Shareholder of both companies, ratified and/or adopted the suit. Mr. Kaburu submitted that the mode of ratification or approval has not been given and so a Resolution is not the only way it can be effected. Counsel relied on Blacks Law Dictionary, 8th edition page 142 where authority is deferred as follows:

"*Authority .1. The right or permission to act legally on another's behalf: esp., the power of one person to affect another's legal relations by acts done in accordance with the other's manifestations of assent; the power delegated by a principal to an agent…*"

The supporting affidavit of Herman Stokman is dated 12th April, 2997 and filed on 2nd May, 2007. In it he deposes in part as follows:

"1. I am a Director of Stokman Rozen B.V. the intended plaintiff and I have been authorized by it to make this affidavit in support of the chamber summons to which this affidavit is attached.

2. That I am familiar with all the facts in this case and I make these depositions from my personal knowledge and as supported by my office records on the transaction giving rise to the case,

3. That Stokman Rozen B.V. owns shares in Stokman Rozen Kenya Limited and I am a director of both companies"

I have considered the above averments in the affidavit of Herman Stokman. The said Herman Stokman describes himself as a director and shareholder of the two Plaintiffs. He avers that he was aware of the facts of the case and was supporting the introduction in the filed plaint, an amendment to include the 2nd Plaintiff.

There was not placed anything before me, any authority to show what can constitute ratifications or authority of a company or its directors or shareholders to sue. It is my view that as long as there was manifestation of assent by either the Company or is Director(s) or Shareholder(s), it was sufficient to satisfy the requirement for approval or authority to sue. I find that the Director's affidavit dated 12th April 2007, was a clear manifestation of assent and approval to the suit. The authority to sue was in the circumstances ratified.

I find and hold that, whether or not the suit needed the approval of the company or its directors or shareholders and whether or not the filing of the suit needed ratification, the same has been provided in the affidavit of Herman Stokman.

There is a side issue, which is equally important, the relationship between the two Plaintiffs in this suit and to the claim. It has been argued by the Defendant that the amended defence introduced a new Plaintiff and a new claim by introducing the 2nd Plaintiff. Mr. Kimani pointed out that in the original plaint, the claim was by the then Stokman (K) Limited, the sole Plaintiff ostensibly for goods supplied and or services rendered by it to the Defendant.

Counsel submitted that after the amendment, the claim became that of the 2nd Plaintiff, the new party, as the one which supplied the roses to the Defendant at its request. Mr. Kimani was disturbed that certain averments in the plaint were not supported by evidence. I will consider each seriatim.

In his submissions, Mr. Kimani submitted that paragraph 3 of the amended plaint was not supported by evidence. The paragraph avers as follows:

"3. The 2nd Plaintiff states that ti has at various times been supplying roses to the Defendant at the Defendant's request and instance."

The summary of the evidence of PW1, Mr. Cheboss is set out at the beginning of this judgment. In his evidence, Mr. Cheboss produced Plaintiff exhibit 2(a) an invoice from the 2nd Plaintiff to the Defendant, Plaintiff exhibit 2(b) a packing list for flowers sent from Holland to the Defendant by the 2nd Plaintiff, Plaintiff exhibits 3(a) to (d) documents applied for by the Defendant to enable the 2nd Plaintiff to send the rose plants to the Defendant from Holland, Plaintiff exhibit 5, the Air Waybill showing the lifting of the rose Plants from Holland to Kenya to the Defendant on 19th September, 1995, Plaintiff exhibit 6 a fax from Defendant to 2nd Plaintiff confirming safe receipt by the Defendant of the rose Serenade from the 2nd Plaintiff. These exhibits are sufficient to support paragraph 3 of the Plaintiffs amended plaint.

Mr. Kimani next refers to averment at paragraph 4 of the amended plaint where the Plaintiffs aver as follows;

"4. As at ~~30th June 1998~~ 24th March 1998 the amount due and owing by the Defendant to the 2nd Plaintiff

was a sum of ~~Kshs.4,507,760.19/- of thereabouts being the equivalent of NLG 138,785.72~~ DFL 149,500 which the Defendant agreed to pay to the 1st Plaintiff by an agreement made on 24th March 1998."

Mr. Kimani submitted that the agreement referred to in paragraph 4 dated 24th March, 1998 was not adduced as evidence. Mr. Kaburu submitted that the document was before the court but that the Defendant objected to its production. Mr. Kaburu's submission is true.

I have however considered the pleadings before the court. In the supporting affidavit of Herman Stokman dated 12th April, 2007, an Agreement signed by H. H. STOKMAN for STOCKMAN ROZEN KENYA LIMITED, the 1st Plaintiff, and P. MUHOHO on behalf of NJAGU LTD. is annexed as part of "H H S-1". The document is titled 'AGREEMENT' and is dated 24th March, 1998. I will set it out in full here below.

"24 March, 1998

AGREEMENT

Mr. Paul G. Muhohu representing Njagu Ltd. PLAINTIFFO. Box 57404 Nairobi, hereby agrees to pay to Stockman Kenya for his outstanding debts regarding the delivery of Rose Plants First Red and Red Serenade according to the following schedule, without any delay:

1. Dfl. 11,000, - before 31-03-1998

2. 50% of the weekly net proceeds of the sale of flowers of Flora-auction Rijnsburg/Holland, or any other auction/outlet of flowers, as per separate agreement between Rabo/Rynsburg-Njagu (Mr. Muhohu) and Stokman.

- All payment to carry on without delay until the full amount of Dfl 149,500, - plus interest has been paid.

- On the outstanding amount, interest will be due as from 31-04-1998. to a rate of 1% per month.

- The outstanding amount will be paid in full, immediately, as soon as Mr. Muhohu receives the bank facilities for the pending request.

- Mr. Muhohu's recognized and appreciates the fact that in case of failure of, or delay in payment as described above, Stokman will have to take further (legal) action.

FOR AGREEMENT

STOKMAN ROZEN KENYA LIMITED NJAGU LIMITED

H.H. STOKMAN PLAINTIFF MUHOHU

Bank account: ABN-AMRO/Nairobi ACC. Nr. 1.63.03.016 DFL

Cc: Neil Lindsay

C/o Oserian D.L. Ltd."

The Agreement was introduced in the affidavit as evidence in support of the amendment of the plaint to include the 2nd Plaintiff. It is part of the evidence of this case and nothing precludes the court from considering it. It is clearly the agreement referred to in paragraph 4 of the amended plaint and forms the basis of the claim in paragraph 7, 8 and prayer (b) of the amended plaint.

Mr. Kimani next refers to averments at paragraph 5 of the amended plaint. Where it is stipulated the Plaintiffs plead as follows:

"*5. Upon demand being made for the aforesaid amounts the Defendant vide it's advocate's letters of 26th August 1998 and 12th January 1999 duly acknowledged being indebted to the plaintiffs and endeavored to settle the monies due."*

Mr. Kimani submitted that of the letters referred to in this paragraph, only the one dated 26th August, 1998 was Plaintiff exhibit 11. That the other one was not adduced in evidence. I have already dealt with this point and have pointed out that the latter letter, dated 12th January, 1999, written by MUHORO & ASSOCIATES, the Defendant's lawyers, then, was PLAINTIFF exhibit 6. I have also pointed out that PLAINTIFF exhibit 6 is referenced *inter alia* 'DEBT OWED TO STOKMAN – NJAGU LIMITED & P. G. MUHOHO. Mr. Kimani's submitted that he concludes by requesting that prices for the Naivasha Roses be given and asks that the terms of payment be preferably the same as for the Red Serenade.

From these two documents, it is clear that the order for First Red Roses, even though supplied by the 1st Plaintiff, was actually placed with the 2nd Plaintiff. It is clear that the Defendant made its order for the First Red Roses with the 2nd Plaintiff and the same were supplied to it through the 2nd Plaintiff.

The Agreement HHS-1 in the affidavit of Herman Stokman, a Director of both Plaintiff companies states in part as follows:

"*Mr. Paul G. Muhoho representing Njagu Limited PLAINTIFFO. Box 57404 Nairobi hereby agrees to pay to Stokman Kenya for his outstanding debts regarding the delivery of Rose plants First Read and Red Serenade according to the following schedule, without delay."*

It is signed by both parties on behalf of the 1st Plaintiff and on behalf of the Defendant.

The agreement establishes two points. It shows that the Defendant had an outstanding debt for the two supplies of rose plants which two exhibits do not show that the debt is owed to the 1st Plaintiff by the Defendant is without merit.

The last issue raised is paragraph 6A of the amended plaint where it is averred:

"*6A. The Defendant is liable to either the 1st or the 2nd Plaintiff or to them jointly."*

Mr. Kimani submitted that the evidence of PW1 did not establish privity of contract between the 1st Plaintiff and the Defendant.

The privity of contract is settled by two documents. First is in addition to Plaintiff exhibits 2 to 5, which prove 28,000 rose serenade was exported to the Defendant by the 2nd Plaintiff. Among other matters, the note states:

"*THANK YOU FOR THE OFFER OF 30,000 PLANTS OF FIRST RED AT NAIVASHA AND WE ARE READY TO PLANT."*

Plaintiff exhibit 4 is another hand written note on the letterhead of Njagu Limited the Defendant to the 2nd Plaintiff. It confirms sending the documents Plaintiff exhibit 3(a) the Plant importation certificate. These are the subject matter of this suit. Secondly it shows that the Defendant had agreed to pay the entire outstanding debt owed over the two supplies, to the 1st Plaintiff. This to me is an assent.

I do find that there was privity of contract between the 1st Plaintiff and the Defendant just as much as one existed between the 2nd Plaintiff and the Defendant. I am satisfied on a balance of probabilities that the

Plaintiffs had a cause of action against he Defendant.

Mr. Kimani submitted that the 2nd Plaintiff did not call any witness. I do not think that this is an issue at all. PW1, Mr. Cheboss gave evidence as Chief Accountant and Human Resource Manager of the 1st Plaintiff. The 1st Plaintiff is owned by the 2nd Plaintiff and the Directors and Shareholders of both companies are the same. As demonstrated in this case, there is evidence to imply that the 2nd Plaintiff assigned its credit due to it from the Defendant to the 1st Plaintiff. The evidence of the sole Plaintiff witness was sufficient to support the claim before the court.

On the paucity of evidence, the entire evidence is before court with the risk of repeating myself. PW1 adduced Plaintiff exhibits 2(a) and 2(b), 3(a), 3(b), 3(c), 3(d), 4 and 5 to prove delivery of the Red Rose Serenade, invoice, and acknowledgement of receipt of same by the Defendant. Plaintiff exhibit 8 was a statement of account for entire debt owed by Defendant to the Plaintiff.

PW1 produced Plaintiff exhibit 4, 6 and 11 all establish that an offer was made for the first Red Rolls, was accepted and entire debt for both Red Rose Serenade and First Red acknowledged. The Agreement dated 24th March, 1998, in the supporting affidavit of Herman Stokman is an acknowledgement of receipt of both supplies of rose plants as above, and of the outstanding debt following the said supply.

I do find that the evidence adduced by the Plaintiffs is sufficient to establish the existence of a valid contract between the parties, establishes that an order was made by the Defendant, offer made by the Plaintiffs which was accepted and supply delivered as requested. It is also established that the consideration for the contract was only paid in part and that there is an outstanding balance which is the subject matter of the claim herein.

The issue of interest is the last one raised by the Defendant. It is Mr. Kimani's submission that the Plaintiffs had no basis upon which to claim the 1% per month claimed on the plaint. In simple response, the Agreement provided for interest at 1% per month on the outstanding debt and it specifically provided that the interest would be applied for 31st April 1998. The 1st Plaintiff and the Defendant signed the Agreement and so both are bound by the said agreement. The interest charged was clearly a part of the party's agreement.

Having come to the conclusions I have of this case, I am satisfied on a balance of probabilities that the Defendant is indebted to the Plaintiffs in the sum of Euros 43,600.80 with interest at 1% per month from 31st April 1998 until day of filing suit and thereafter at court rates form the date of judgment until payment in full.

The Plaintiffs are also entitled to the cots of the suit with interest at court rates.

The Defendants Defence is dismissed. I enter judgment for the Plaintiffs jointly and severally against the Defendant in the sum of Euros 43,600.80 with interest at 1% per month from 31st April 1998 to 3rd May 2000 and thereafter interest at court rates from date of judgment until payment in full. The Plaintiffs will also have the costs of this suit with interest at court rates.

Dated at Nairobi, this 30th day of May, 2008.

LESIIT, J.

JUDGE

Read, signed and delivered, in the presence of:

Mr. Kaburu for the Plaintiffs

Mr. Njenga holding brief for Mr. Kimani for the Defendant

LESIIT, J.

JUDGE

Mr. Njenga: We apply for stay of 30 days to enable defendant file an appeal.

LESIIT, J.

JUDGE

Court: Stay of 21 days granted.

LESIIT, J.

JUDGE