



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

Civil Suit 761 of 2000

KENYA LIMITED1st
PLAINTIFF

MARKETING AND SERVICES INTERNATIONAL2nd
PLAINTIFF

TOTAL VERSUS

EURAF TRADING COMPANY LTD 1ST
DEFENDANT

BADRUDING KASSAM2ND
DEFENDANT

JUDGEMENT

The plaintiffs have sued the defendants on the basis of a Sale Agreement between the 2nd plaintiff and the 2nd defendant.

It is the plaintiffs case, as pleaded in paragraph 5 of the Plaint, that the 2nd defendant collected petroleum products from the 1st plaintiff, and exported the same to Central Africa. The said petroleum products are said to have been supplied by the 2nd plaintiff.

From the Plaint, it is not clear when exactly the contract between the parties was executed. However, at paragraph 6 of the said Plaint, it was asserted that in or around 1998 the 2nd defendant began defaulting in his payments to the plaintiffs.

After the 2nd defendant had defaulted consistently, the parties are said to have carried out a reconciliation of accounts in November 1998, which culminated in a Memorandum of Understanding dated 19th November 1998.

When PW2, WINNIE WANGUI KIMOTHO, testified, she said that she did witness the 2nd defendant executing the Memorandum of Understanding. Indeed, she confirmed that the signing of the said Memorandum of Understanding was carried out at the offices of the 1st plaintiff, whereat the witness worked as the Exports Coordinator.

The other witness in this case was PW1, MARY ARENDE. She was the Export Sales Manager of Total Kenya Limited, the 1st Plaintiff.

It was her evidence that the 2nd Plaintiff was a marketing body, for the Total Group, of which the 1st plaintiff is its agent in Kenya. She also testified that the 2nd plaintiff had given to the 1st plaintiff herein, the requisite authority to pursue the claim in this action.

The said authority was in the nature of a letter dated 1st March 2000, through which the 2nd plaintiff expressly said;

"Accordingly, we hereby request TOTAL KENYA LTD., as our agents in Kenya, to take all necessary legal actions to secure our rights in this matter and recover monies due to our company. This includes the filing of suit, execution of judgement and all other lawful actions that will result in the recovery of the debt owing to us in relation thereto."

The rationale tendered by the 2nd Plaintiff for asking the 1st plaintiff to pursue legal action was that the products had been lifted from the depots of Total Kenya Limited, and payments had also been made through the offices of the 1st Plaintiff, as agents of the 2nd plaintiff.

In her evidence, PW1 said that the defendants used to be clients of the plaintiffs. According to her, the 2nd plaintiff would make out proforma invoices to the defendants. Once the said proforma invoices were accepted by the defendants, the 1st plaintiff would make deliveries to the defendants, on behalf of the 2nd plaintiff. All such deliveries are said to have been made within Kenya, and the payments for the same were supposed to have been made within 30 days of such delivery.

PW1 said that the defendants did make payments until early 1998. But then in April 1998, the defendants are said to have given two cheques, which were dishonoured. The two cheques were adduced in evidence.

The first of them was dated 17th April 1998, and was for USD 100,000, whilst the second cheque for USD150,000 was dated 30th April 1998.

As is evident on the face of the cheques, they were drawn on an account belonging to Mr. & Mrs. Badrudin S. N. Kassam. And, according to PW1, the cheques were drawn by the 2nd defendant.

Following the dishonour of the cheques, the witness testified that the parties to this suit did reconcile their accounts. The reconciliation was acknowledged in a Memorandum of Understanding dated 16th December 1998, which as we have already seen, was executed by the 2nd defendant, in the presence of PW2.

Primarily, the plaintiffs' case is founded on the invoices which the 2nd plaintiff issued to the defendants, as well as the Memorandum of Understanding, and the dishonoured cheques. Save for one, the invoices were addressed to B. KASSAM, whose postal address was given as 690 BUNIA. The invoice which is an exception was addressed to TAZARA at Post Box 2834, DAR-ES-SALAAM.

However, as the defendants did not attend court on the date when the trial was scheduled to take place, the witness who testified for the plaintiffs, as well as the documentary evidence was not tested. In effect, the evidence was uncontroverted.

So what was the sum total of that evidence?

To my mind, it is best embodied in the Agreement dated 16th December 1998, in which the 2nd defendant admitted owing USD 563,212.46. By that admission, the 2nd defendant admitted owing the said sum to

the plaintiffs. Indeed, the Agreement did not make any reference to the 1st defendant.

However, out of that total sum, USD 51,097 was to have been paid through some transfer of funds as well as through payments by customers of the 1st defendant. The particulars of the said payments were set out in clause (c) (i) of the Agreement dated 16th December 1998.

In my understanding therefore that the sum, (of USD 51,097) has to be deducted from the sum claimed by the plaintiffs. That would leave a balance of USD 527,115.46, if one went by way of the figures in clause (c) (ii) of the Agreement. But by my calculations, the balance ought to be USD 512,143.46.

As the court is not aware of the manner in which the parties arrived at their said figures, which they incorporated onto the signed Agreement, I will accept their figures as reflective of the agreement between them.

Accordingly, I find and hold that the 2nd defendant is liable to pay to the plaintiffs the sum of USD 527,115.46.

As regards interest on that principal sum, the plaintiffs have demanded that they be paid at the rate of 30% from 29th June 2000, when the suit was filed. According to PW1, the parties had not agreed on the issue of interest. However, she expressed the view that the plaintiffs were entitled to interest at that rate **"because of the forex gains and losses. That would help the plaintiff's be restored financially."**

I am afraid that in the absence of an agreement on the issue of interest, the plaintiffs desire to be restored financially is not sufficient to justify the rate of interest sought. In my considered view, if the plaintiffs had wished to secure protection against forex gains and losses, they should have taken steps at the stage when they were negotiating the terms of business with the defendants, to entrench such protection in the contract.

As no such steps was taken, I do hereby exercise the discretion bestowed upon me by Section 26 of the Civil Procedure Act, to award interest at court rates, from the date the suit was filed, until payment in full. The plaintiffs are also awarded the costs of the suit as against the 2nd defendant.

However, as the plaintiffs did not demonstrate to my satisfaction, the nexus between them and the 1st defendant, the suit as against the said defendant is dismissed. But because the 1st defendant did not attend court to defend itself, I make no order as to costs, in that regard.

Dated and Delivered at Nairobi this 1st day of February 2007.

FRED A. OCHIENG

JUDGE