



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Civil Case 47 of 2004

MAISHA FLOUR MILLS LTD.....PLAINTIFF

VERSUS

CHARLES MURIUKI GITHINJI T/A STAREHE WHOLESALERS.....DEFENDANT

J U D G M E N T

By a plaint dated 7<sup>th</sup> May, 2004 and filed in court on 20<sup>th</sup> May, 2004, the plaintiff has sued the defendant for a liquidated sum of Ksh.4,924,100/= plus costs and interest on account of goods sold and supplied by the plaintiff to the defendant at the latter's own request and instance. When served with the plaint, the defendant duly entered an appearance and subsequent thereto filed a defence in which in a nutshell he denied owing the plaintiff the amount claimed. It is his defence that whereas he was supplied with goods by the plaintiff at his request he had nonetheless fully paid the plaintiff either in cash or cheque the amount now being claimed by the plaintiff.

The matter was first set down for hearing before me on 8<sup>th</sup> March, 2007. However the case could not take off for the reason that **Mr. Gacheche wa Miano**, Learned Counsel for the defendant was unable to attend court on that day as allegedly his motor vehicle broke down between Karatina and Nyeri as he was on his way to this court. Having waited for eternity for the defendant's counsel to turn up, the court was compelled to adjourn the matter on condition that the defendant would meet the plaintiff's costs of that day assessed at Ksh.6,000/= as well as court adjournment fees.

The matter was then set down for hearing before me again on 19<sup>th</sup> June, 2007. Again for unexplained reason(s) the defendant's counsel was absent when the case was called out. Apparently and though the defendant's counsel had been seen in court earlier on, he had left unexpectedly for Karatina, Senior Resident Magistrate's court leaving his client, the defendant with his file. It is also transpired that the defendant had neither paid the plaintiff its costs nor court adjournment fees as ordered on 8<sup>th</sup> March, 2007. At this juncture the court directed the defendant to proceed and pay the court adjournment fees before he could be given audience to address the court. The defendant left as though he was complying with the court's directive. However that was the last time that the court saw of him. Having patiently waited upto 2.30pm for the defendant to pitch camp albeit unsuccessfully and their being no explanation for his and or his counsel's absence, I directed that the plaintiff's case proceeds to hearing the defendant's absence notwithstanding.

In abid to prove its case, the plaintiff called one witness, **Habil Waseka**, an internal auditor with the plaintiff. From his testimony which was largely unchallenged and uncontroverted, it emerged that the plaintiff used to sell and supply to the defendant wheat flour on account. Between the years 2000 and 2002, the defendant had accumulated a debt of Ksh.4,924,100/= on account. The witness tendered various invoices and delivery notes in verification of the fact. All the delivery notes and invoices aforesaid were duly acknowledged and signed for by the defendant. The witness further testified that the defendant attempted to settle the outstanding amount by issuing two (2) cheques for Ksh.387,000/= and 516,000/= respectively. However when the cheques were presented for payment on their due dates, they were returned unpaid for the reason that there were "**insufficient funds**". The dishonoured cheques were tendered in evidence. By a letter dated 31<sup>st</sup> January 2002, addressed to the plaintiff by the defendant, the defendant acknowledged owing the plaintiff the amount claimed. However he pleaded for time and

understanding from the plaintiff to enable him settle the claim. The said letter was tendered in evidence as well.

From the above evidence, it is quite clear to me that the defendant is truly and justly indebted to the plaintiff to the tune of Ksh.4,924,100/=. He was so indebted at the commencement of this suit. I note that in his defence, the defendant alludes to having settled the claim. However there is no evidence, documentary or otherwise to backup the claim. I doubt whether if the defendant had actually settled the claim, he would have written the letter dated 31<sup>st</sup> January, 2002 pleading for indulgence from the plaintiff. Further if indeed he did not owe the amount, how come he did not respond to the demand letter dated 9<sup>th</sup> May, 2005 from the plaintiff's lawyers setting the record straight. I also doubt very much that knowing very well that they had been fully paid by the defendant, the plaintiff would again lodge the instant claim against the defendant.

Having evaluated carefully the evidence in support of the claim, I find that there is no dispute that the plaintiff supplied goods to the defendant. It is also not disputed that some of the cheques issued by the defendant to the plaintiff in partial settlement of the amount were dishonoured. Has the defendant however settled the account with the plaintiff by either cash or cheque as claimed. On the evidence before me and which as I have already stated was unchallenged and uncontroverted I find that the defendant did not do such thing and indeed he still owes the plaintiff the sum claimed. When the question as to whether the defendant had satisfied the claim was put to PW1 by his counsel he was categorical that the claim had yet to be settled to date.

On the undisputed evidence of the plaintiff, I am satisfied and I find that the plaintiff has on the balance of probability proved its case and is entitled to judgment. Accordingly I now enter judgment against the defendant and in favour of the plaintiff for the liquidated sum of Ksh.4,924,100/- plus interest at court rates. The plaintiff shall also have the costs of this suit. This is the judgment of the court.

***Dated and delivered at Nyeri this 11<sup>th</sup> Day of July 2007.***

**M.S.A. MAKHANDIA**

**JUDGE**