



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 172 of 2004

STOKMAN ROZEN (K) LIMITED..... PLAINTIFF

VERSUS

REDHILL FLOWERS (K) LIMITED.....DEFENDANT

JUDGMENT

The Plaintiff, STOCKMAN ROZEN KENYA LIMITED has sued the Defendant REDHILL FLOWERS (K) LIMITED over a debt of Euros 38,911.65 being balance of money, due and owing to the Plaintiff from the Defendant. The Plaintiff Company called one witness to testify, Mr. Patrick Chebos, its Chief Accountant. Mr. Chebos in his testimony stated that his duties entailed monitoring debtors, creditors, maintaining the internal audit system, corresponding with clients and keeping all banking positions. Mr. Chebos informed the Company that the Company dealt with propagation and sale of Rose Plants, and with grafting and sale of seedlings to farmers. He testified that the Defendant Company was one of its customers. He stated that in the year 2000 the Plaintiff and Defendant entered into contracts in which the Plaintiff Company supplied to the Defendant Company various Rose Plants on its request. The witness took the court through the contracts, which were in the form of various order confirmations, signed by representatives of both companies which he produced as P.exh.1.

The first such order confirmation was dated 22nd January, 2000. In it the Defendant Company ordered for 30000 candid prophyta valued at NLG 97,500. (NLG stands of GUILDERS).

The second order confirmation is dated 27th April, 2000 and is for 4000 candid prophyta valued at NLG 13000. Mr. Chebos identified the Invoice No.055/00 dated 25th May, 2000 sent by the Plaintiff Company to the Defendant Company. It was for a total of NLG 110,500. Mr. Chebos testified that the Plaintiff Company only paid the initial deposit of NLG 9750 which was less than the 10% deposit required as per their agreement. Eventually the Plaintiff received payments totaling NLG 24,750 leaving an outstanding balance of NLG 75,750 equivalent of Euros 38,911.65.

Mr. Chebos produced a letter from the Defendant to Plaintiff dated March, 29th, 2001 forwarding Euros 2269 being equivalent of NLG 5000. Mr. Chebos explained that the letter was also confirming what the two companies had agreed that since Guilders ceased to be legal currency in favour of the Euros in 2001, the parties had agreed to convert the debt to Euros at the rate of 2.20371 Guilders to one Euro.

Mr. Chebos produced a “NOTES ON MEETING” dated 17th March, 2001 in which James Hutchings for the Plaintiff Company and Mrs Ndungi, Susan Ndungi and Chris Fryer for the Defendant Company were present. The document is not signed and neither is it on a letter head. Its authenticity is in question

and since Mr. Chebos, the witness was not in the meeting, that document was disregarded. I could only consider it if it was produced by consent by both parties.

Mr. Chebos identified an agreement on the Plaintiff's letter heads signed by representatives of the Plaintiff & Defendant Company dated 17th March, 2001. In it the parties agreed that the Defendants outstanding debt was NLG100,750. They also agreed that the Defendant would liquidate the debt by payment of NLG 5000 per month starting March, 2001. Following that agreement, Mr. Chebos testified that the Defendant had paid only three installments of NLG 5000 each but no further payments were made. Mr. Chebos produced a statement of the Defendants account with them in which the payment of NLG 9750 and three payments of NLG 5000 each are reflected leaving an outstanding balance of EUROS 38911.65.

Mr. Chebos also produced various correspondence between both parties exchanged over the debt before the Plaintiff finally filed this suit. The witness testified that since instituting the suit, the Defendant made a further payment of Kshs.50,000/= by a cheque No. 101585. Mr. Chebos asked that this amount be deducted from the outstanding sum claimed.

Commenting on Paragraph 6(a) of the defence, Mr. Chebos testified that the Plaintiff company denies that it supplied deceased seedlings to the Defendant. The witness wondered why the issue was never raised before the suit was filed in 2000 and also why even after the suit was filed, the issue was raised for the very first time in the statement of defence filed in 2004. Mr. Chebos testified that the Plaintiff filed a reply to the defence in which it denied the allegation.

The Defendant's did not come for the hearing of the case despite being served with a hearing notice. After the Plaintiff testified, the Court adjourned the case to enable the Plaintiffs Advocate file and serve submissions before highlighting them to the Court. It is at that point that the Defendant's Advocate came up, causing one more adjournment to enable them to file and serve submissions. In the resumed hearing, both Advocates highlighted their submissions in the court.

The gist of the Plaintiff Advocates submissions was that the Plaintiff's claim was unchallenged, proved by the fact that no issues were ever raised challenging the debt either before or after the filing of the suit. Mr. Kaburu for the Plaintiff submitted further that the Defendant acknowledged its debt since after the suit was filed, the Defendant made payment of Kshs.50,000/= towards the debt. Counsel urged the court to find the Plaintiff's case proved and to enter judgment for the Plaintiff as prayed.

The gist of the Defendants Advocates submissions, Ms. Chepkwony, was that the evidence of the Plaintiff's single witness was insufficient to prove the case on grounds:

- a) Insufficient documentary evidence was adduced and in any event he was not the maker of either document.
- b) Admission referred to by the witness were not proved by documents.
- c) Statement of accounts relied on was in Moribund currency whose conversion was unreliable.

Ms. Chepkwony submitted that even though the

Defendant called no witness, its Statement of defence stood unchallenged.

I have carefully considered the evidence adduced in the case, the pleadings, the exhibits produced by the Plaintiff and the submissions by both sides.

Stating with the submissions by the Defendants Advocate, it is imperative to consider the gist of the statement of defence filed herein. In the defence, paragraphs 3 and 4 allude to the terms of contract entered into between the two parties. It is averred that the Plaintiff was to supply candid prophyta rose bush stems which were to mature within 45 days. The Defendant avers that the Plaintiff breached the said

terms when it supplied 34400 stems out of which 10000 failed to mature within the 45 days but took over 90 days to mature occasioning loss and damage to the Defendant. The Defendant particularized the loss it suffered as Kshs.1,000,000/= in sales and 1,200 bushes through infection. In paragraph 7 the Defendant pleads that it is entitled to a set off in the sum of Kshs.1,500,000/=.

In regard to the diseased rose bushes I have considered that the seedlings were supplied to the Defendant Company in 2000. The Defendant paid NLG 9750 and a further NLG1500 in three installments between March and June, 2001. There are various correspondences exchanged between the parties dating between April, 2000 and August, 2002. In none of these correspondences was the issue of diseased seedlings or loss raised by the Defendant. If anything, the Defendant intimated that it was making effort to clear the debt. The first time that the issue of diseased seedlings and loss arose is in the statement of defence filed over four years after the supply of the seedlings in question were supplied. I consider the raising of the issue at that stage an afterthought.

In addition to the inordinate delay taken by the Defendant to raise the issue of the quality of the seedlings supplied, the Defendant was fully served with the hearing notice but neither the Company nor its Advocate appeared for the hearing. All the allegations in the statement of defence remained unsubstantiated as no evidence was adduced to support the defence. Since the Plaintiff replied to these allegations denying them, then the said facts were contested. Evidence was in the circumstances required to substantiate them. None was forthcoming. On a balance of probabilities I find that the Defendants defence remained controverted and unsubstantiated and therefore is without merit.

In regard to the Plaintiff's case, the Plaintiff called evidence and adduced documents. The documents were on the Company letter heads and established that the Defendant indeed made two orders for rose bushes totaling 34000 rose seedlings which were supplied. The Plaintiff has adduced evidence to show that the Defendant paid NLG10650 before the suit was filed and kshs.50000 after the suit was filed. These payments are uncontroverted. The part payments are proof of the Defendants acknowledgment of the debt and of its attempt to liquidate the same. These part payments are also proof that the suit was compromised.

In regard to the issue of the exhibits not being produced by their makers, Mr. Chebos stated that his duty in the Company included all correspondences with the Company clients and the maintaining of accounts. The documents kept by the witness included the exchanged correspondences between the two parties on Company letter heads together with the statement of accounts. These documents were admitted in evidence. It is rather late in the day for the Defendant to challenge their admission in submissions before the judgment is written. Had the Defendant wanted to challenge them, it should have done so during the hearing of the suit.

Alternatively it was still open for the Defendant to have applied either to cross-examine the Plaintiff's witness before judgment or to set aside the proceedings for good cause, in order to have the matter heard afresh.

Since the Defendant chose not to be present during the hearing of this suit, and not to apply to cross-examine the witness, then it cannot be heard at this stage to challenge the admissibility of the document. I find no merit in those submissions and I dismiss them accordingly.

Having considered this case, I am fully satisfied that the Plaintiff has proved its case on the required standard. Judgment is therefore entered in favour of the Plaintiff against the Defendant in the following terms:

- a) Judgment for the Plaintiff against the Defendant in the sum of Euros 38,911.65 less Kshs.50,000/= paid after the suit was filed.
- b) Interest on the said sum in (a) above at court rates from 1st March, 2001 until payment in full.
- c) The Plaintiff also gets the costs of this suit.

Dated at Nairobi this 30th day of November, 2007.

LESIIT, J.

JUDGE

Read, signed and delivered in the presence of:

Kaburu for Plaintiff

Ms. Chepkwony for Defendant

LESIIT, J.

JUDGE