



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

**CIVIL CASE 25 OF 2002**

**TOTAL KENYA LTD. ....PLAINTIFF**

**VERSUS**

**MIDADO COMMUNICATIONS LTD. ....DEFENDANT**

**JUDGMENT**

By a plaint dated 18.1.2001 and filed on 15.1.2002 the plaintiff instituted this suit against the defendant seeking a sum of Kshs.14,140,644.93 together with interest thereon at Commercial rates from 1.11.2000 till payment in full. The claim is stated to be pursuant to a tender won by the defendant for the supply of 8000 metric tons of fuel oil at a unit price of Kshs.16.70 per litre to Kengen Company Ltd. (herein after “Kengen”) which tender required the supply of the said fuel oil to Kengen’s Kipevu Power Station.

Subsequently, according to the plaintiff by a contract dated 24.8.2000 between the plaintiff and the defendant the latter requested the plaintiff and the plaintiff agreed to supply the said fuel at the defendant’s order the Kengen’s Kipevu Power Station at an agreed price of Kshs.16.25 per litre. The plaintiff contends that in due compliance with the said contract, it supplied the said fuel oil to the satisfaction of both the defendant and Kengen. The sums under the contract, according to the plaintiff, were due and payable by the defendant to the plaintiffs by the 30.10.2000. The plaintiff further contends that on 14.9.2003 it supplied fuel to both Kengen and a third party Triton Limited, the latter supply being of 1035911 metric tons of fuel oil worth Kshs.16,833,448.12. The plaintiff in error invoiced the defendant for Kshs.16,833,448.12 for the supply of 1,035,911 metric tons of fuel oil when the correct invoice should have been for the supply of 1,906,110 metric tons of fuel oil worth Kshs.30,974,093.03 as the supply of 1035,911 metric tons of fuel had been made to the said third party, Triton Limited.

The plaintiff further contends that, it discovered the error and served the defendant with the correct invoice for the correct sum of Kshs.30,974,093.05 of which the defendant paid Kshs.16,833,448.12 leaving a balance of Kshs.14,140,644.93 as the sum due and payable by the defendant on the strength of the correct invoice. That is the sum which the plaintiff claims as stated before.

The defendant filed a defence on 5.11.2002 in which it denied the contract as set out by the plaintiff or at all and put the plaintiff to strict proof. Without prejudice the defendant stated that if it entered into any contract of supply with the plaintiff the supply was fully paid for.

The plaintiff filed a Reply in which it joined issue with the defendant upon its defence. It also reiterated the contents of paragraph 3 which according to the plaintiff was admitted by the defendant. In further reply to the averments in the defence, the plaintiff reiterated its averments in the plaint and denies

that the defendant fully paid for the supply made by the plaintiff as stated in the plaint.

The case came up for hearing before me on 2.5.2007. The following issues were framed for trial:-

- 1. Whether there was a contract for supply of goods between the plaintiff and the defendant and if so what were the terms.**
- 2. Whether the plaintiff delivered to the defendant fuel worth Kshs.30,974,093 in August 2000.**
- 3. Whether the defendant fully paid for the deliveries.**
- 4. Whether invoice No.509133 given to the defendant by the plaintiff for the said supply was in error.**
- 5. Whether the sum of Kshs.14,140,644.93 is due and owing to the plaintiffs.**
- 6. Who should bear the costs of the suit.**

The plaintiff called one witness Michael Ndunda (PW1), the

Plaintiff's key Accounts Manager. He told the court that the plaintiff commenced business with the defendant in August 2000. The defendant had an order to supply 8 million litres of fuel to Kengen. The plaintiff agreed to supply the said fuel on terms. The price per litre was agreed at Kshs.16.25 inclusive of VAT and relevant documentation was done. Payment was to be made within 30 days. The plaintiff supplied and the defendant paid for all the supply save for only one which had not been fully paid for.

PW1 further testified that on 25.8.2000 the plaintiff made 2 deliveries: one under the contract and another to Triton Petroleum. The plaintiff however by mistake invoiced the defendant, for supply made to Triton Petroleum which was smaller. The error was corrected and reversal entries were made. The correct invoice was then served. According to PW1, the plaintiff pumped 1,906,110 litres valued at Kshs.30,974,094.5. The incorrect invoice was for 1,035,911 litres worth 16,833,448.12 which was for fuel pumped at the same time to Triton Petroleum. The defendant paid for the smaller supply intended for Triton Petroleum although its supply was for the larger fuel stated above. The defendant was informed of the error but did not pay for the balance of fuel supplied. PW1 testified that the plaintiff's claim related to the difference of Kshs.14,127,635.00 plus interest and costs. He produced PEX 1 comprising the invoices, statement forms and other documents he referred to. He stated that the plaintiff had no contract with Kengen but with the defendant and it could only invoice the defendant. He produced an invoice from the defendant to Kengen for the same amount of fuel delivered by the plaintiff on the same day.

The defendant did not call any witness. Counsel agreed to file written submissions which were in place by 23.10.2007. I have considered the oral testimony of PW1, the documentary evidence produced, the written submissions of counsel and the cases relied upon. Having done so, I am now in a position to answer the issues framed by the parties.

The defendant admitted that it won a tender for the supply to Kengen of about 8000 metric tons of fuel oil CST 180 at a unit price of Kshs.16.70 per litre inclusive of VAT. The defendant did not also deny the specific averments made by the plaintiff in its plaint. The plaintiff particularized various supplies and how the same were invoiced and the sums claimed for under those invoices. According to the plaintiff only one invoice was disputed by the defendant. The plaintiff further gave details of circumstances leading to that dispute. The defendant did not specifically deny those averments.

The plaintiff produced PEX1 comprising invoices including the invoice for the supply in dispute. Of crucial importance is the defendant's invoice dated 25.8.2000 to Kengen for the supply of fuel oil amounting to 1,904,348. Under that invoice the defendant claimed Kshs.30,802,612.00 from Kengen. The plaintiff also produced its Memo on the subject "Pump Over" indicating that on 25.8.2000, it pumped 1,035,909 to Triton and 1,904,348 to the defendant. The defendant did not suggest that its tender to

Kengen was effected through any other supplier other than the plaintiff.

Given the evidence adduced by the plaintiff especially the specific documents referred to above, I find and hold that there was indeed a contract between the plaintiff and the defendant for the supply of fuel oil. Issue number one is accordingly answered in the affirmative.

The same evidence shows on a balance of probabilities that the plaintiff did deliver to the defendant fuel worth Kshs.30,974,093 in August 2000. The price per unit was agreed. The defendant did not testify. It did not suggest how and why the delivery of 1,906,110 litres would cost less than the other deliveries. The plaintiff in my view satisfactorily explained the error in the invoice for that delivery. There is no doubt that the defendant invoiced Kengen for that delivery.

In the premises, the plaintiff has on a balance of probabilities persuaded me that the defendant did not fully pay for the delivery of the said 1,906,110 litres. That finding provides the answers to issue numbers 3, 4 and 5.

On the basis of the evidence tendered by the plaintiff's witness Michael Ndunda and the documents produced by consent, I am satisfied that the plaintiff has proved its case against the defendant on a balance of probabilities and is entitled to judgment for the sum claimed in the plaint.

On the issue of interest the plaintiff did not explain what it sought as commercial rates. The same cannot therefore be granted. Interest will therefore be at court rates.

Judgment is therefore entered for the plaintiff as prayed with interest thereon at court rates.

The plaintiff shall have the costs of this suit.

Orders accordingly.

**DATED and DELIVERED at NAIROBI this 29<sup>th</sup> day of November 2007.**

**F. AZANGALALA**

**JUDGE**

Read in the presence of:- Ms. Mungai for the plaintiff and Wamiti holding brief for Thangei for the plaintiff.

**F. AZANGALALA**

**JUDGE**

**29/11/07**