



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Case 2383 of 1995

SIGINON FREIGHT LIMITED..... PLAINTIFF

VERSUS

CANDY LOGISTICS LIMITED.....DEFENDANT

JUDGMENT

This suit was initiated by plaintiff initially filed on 28.07.95. That plaintiff was subsequently amended by amended plaintiff filed on 21.09.98 praying for judgment against the defendant for:-

- i) The principal sum of US \$202,717.45 or its Kenyan currency equivalent.
- ii) Storage charges of 226 CBM at 30/= per CBM per week from May 1995 until payment in full.
- iii) Costs and interests at prevailing bank rates.
- iv) Such further or other orders the court may deem fit to grant.

There are two copies of the same defence in the file, one filed on 11.12.96 and the other filed on 19.02.98 denying the plaintiff company's claim and making counter-claim praying for judgment for:-

1. An account of all the money belonging to the defendant which has come to the hands of the plaintiff or received by any other person on behalf of or on account of the plaintiff.
2. An order for payment to the defendant by the plaintiff of any sum found due from the defendant to the plaintiff upon taking such account.
3. Further proper accounts, inquiries and directions.
4. Interest on any sum found due as per (2) above.
5. Costs and interest on costs.

On 14.04.97 the plaintiff company filed reply to defence and defence to counter-claim essentially reiterating the earlier claim and averring that it had furnished the defendant with requisite accounts plus supporting documentary evidence.

On 27.10.05 the case file was placed before me. Miss C.W. Muigai held brief for Mr. Mutula Kilonzo Junior from the plaintiff. There was also Mr. A.O. Angote who said he represented the plaintiff in HCCC No.2283 of 1991. Miss Mungai informed this court that there was no application pending in this case. For his part, Mr. Angote clarified that he had filed a chamber summons dated 20.09.05 in HCCC No.2283 of 1991 under certificate of urgency and that the said chamber summons plus orders thereon had been wrongly placed in the present file, i.e. HCCC No.2383 of 1995. Mr. Angote asked that the present file be placed before the Duty Judge for necessary directions. Accordingly, the present file was placed before the Duty Judge (Njagi, J) who vacated the interlocutory orders wrongly recorded in the present file.

On 05.10.05 hearing of the present suit started before me whereat the plaintiff company was represented by learned counsel, Mr. Mutula Kilonzo Junior. There was no appearance for the defendant company.

Plaintiff company's counsel informed this court that Messrs Kaplan & Stratton Advocates Nairobi who used to act for the defendant company had subsequently applied to withdraw from acting for the defendant company and had been allowed to so withdraw. After withdrawing from acting for the defendant company, Messrs Kaplan & Stratton Advocates furnished Messrs Kilonzo & Company, Advocates for the plaintiff company with the address of the defendant company in the U K. Plaintiff company's advocates then sent a letter on 07.03.05 to the defendant company on their U K address by registered international post inviting them to attend at the Civil Court Registry, Nairobi on 17.03.05 at 10.00 a.m. for purposes of taking a hearing date for this suit but the defendant company never responded. Records in the court file show that plaintiff company's advocates then fixed the suit for hearing on 05.10.05.

An affidavit of service by Ibrahim W. Lubia, process server of P.O. Box 59839 – 00200, Nairobi sworn 04.10.05 shows that on 22.03.05 he caused service of hearing notice of 17.03.05 by registered international post to the defendant company's last known address of Candy logistics Limited, Gate House, No.1, Farringdom Street London E C 4 M 7 LH United Kingdom. The hearing notice so sent notified the defendant company that this suit was listed for hearing on 05.10.05 at 9.00 a.m. at the High Court of Kenya, Nairobi and that if the defendant company did not appear, the suit would proceed in their absence. Plaintiff company's counsel sought to proceed with the hearing and I allowed the hearing to proceed, the absence and non representation of the defendant company that this suit was listed for hearing on 05.10.05 at 9.00 a.m. at the High Court of Kenya, Nairobi and that if the defendant company did not appear, the suit would proceed in the absence. Plaintiff company's counsel sought to proceed with the hearing and I allowed the hearing to proceed, the absence and non-representation of the defendant company notwithstanding.

Only one witness testified in this suit, i.e. Robert Murogo Kieru (P.W.1). He gave evidence on behalf of the plaintiff company. The essence of his evidence is as under. High Court was at the time of hearing the Acting Branch Accountant in the plaintiff company. He confirmed from his examination of the plaintiff company's records that the plaintiff company had business dealings with the defendant company.

The defendant company had been contracted by Unosom and Unamir to organize for relief aid to be exported to Kigali in Rwanda and to Somalia. The defendant company, which was based in England, sub-contracted the plaintiff company to export the relief aid and other things required in Rwanda and Somalia. Once in a while the plaintiff company also transported consignments from Mombasa to Nairobi on behalf of the defendant company. The plaintiff company also did packaging for the said relief aid on behalf of the defendant company.

P.W.1 gave 1994 – 1995 as the period when the plaintiff company carried out the activities giving rise to this suit. The plaintiff company rendered requisite services to the defendant company and raised the necessary invoices. The defendant company paid only some invoices but not others. Plaintiff company demanded payment for the unpaid invoices by fax after sending hard copies. P.W.1 produced a list of the unpaid invoices as Exhibit 1. the value of the said invoices totals US \$159,010.880. P.W.1 also produced a bundle of photocopies of the invoices in question totaling 318 invoices as Exhibit 2. At this juncture, P.W.1 revisited the amended plaint which claims US \$202,717.45 and clarified that when the plaintiff company made a schedule of copies of the unpaid invoice available in the plaintiff company's files, they

only amounted to US \$159,010.880, which is what has been reflected as owing vide Exhibit 1. P.W.1, therefore, sought amendment of the amended plaint to show the figure of US \$ 159,010.880 reflected in Exhibit 1 as the amount owing from the defendant company to the plaintiff company. At this point, plaintiff company's counsel made an application for further amendment of the amended plaint to reflect the amount claimed under prayer (i) from US \$202,717.45 to US \$159,010.880 as reflected in Exhibit 1. this is permissible under Order VIA rule 8 of Kenya's Civil Procedure Rules and I allowed the amendment. P.W.1 then said that the amount the plaintiff company was now claiming under prayer (i) is reduced to US \$159,010.880.

P.W.1 moved next to the plaintiff company's claim for storage charges under prayer (iii). He told the court that the period in question was May, 1994 – July, 1995. P.W.1 said that during this period, the plaintiff company offered the defendant company warehouse storage facilities. The applicable rate of charge was Kshs.30/= per cubic metre per week and that the total number of weeks the plaintiff company stored goods for the defendant company was 252 weeks. The goods occupied 226 CBM (Cubic Metres). The plaintiff company raised an invoice in this regard for Kshs.2,016,100.80. P.W.1 produced a copy of the requisite invoice as Exhibit 3.

The next issue P.W.1 testified on related to court orders which authorized the plaintiff company to dispose of/sell the goods the plaintiff company has stored for the defendant company. He said the goods were duly sold and the proceeds deposited with the Housing Finance Company of Kenya (HFCK) as ordered by court. The proceeds amounted to Kshs.810,852.75 which was duly deposited with the HFCK. P.W.1 produced the following bundle of documents relating to the Kshs.810,852.75:-

- A. Exhibit 4 (a) – HFCK fixed deposit receipt for Kshs.810,852.75.
- B. Exhibit 4 (b) – cheque from Kilonzo & Co. Advocates for the kshs.810,852.75 drawn in favour of the HFCK.
- C. Exhibit 4 (c) - letter of 10.02.2000 from Whitestone Auctioneers (K) Ltd remitting the Kshs.810,852.75 to Kilonzo & Co. Advocates being the proceeds of sale of the stored goods alluded to above.

P.W.1 added that he was aware the said deposit was still being held by the HFCK and as at that time it stood at Kshs.1,005,488.48. He produced the HFCK deposit receipt for Kshs.1,005,488.48 as Exhibit 5 and urged that the said deposit be released to the plaintiff company if the suit is successful.

The last issue testified on by P.W.1 related to security for costs which the defendant company was ordered by court to deposit with the HFCK. That deposit was for Kshs.74,846.15. P.W.1 produced the requisite fixed deposit certificate in respect of security fro costs in the sum of Kshs.74,846.15 as Exhibit 6. The certificate is in the names of Kaplan & Stratton Advocates and Kilonzo & Co. Advocates. P.W.1 clarified, however, that after Kaplan & Stratton Advocates came out of record, the deposit was changed into the names of Kilonzo & Co. Advocates and the Deputy Registrar of the High Court of Kenya. The amount as at the time of the hearing of this suit stood at Kshs.121,218.58. P.W.1 produced the fixed deposit certificate for the said amount of Kshs.121,218.58 as Exhibit 7.

I have given due consideration to the evidence tendered before court by P.W.1 on behalf of the plaintiff company. P.W.1 spoke with confidence and produced requisite documents in support of the plaintiff company's case. As pointed out earlier, the defendant company did not appear at the hearing of the suit despite having been notified of the hearing by registered international post. The plaintiff company's evidence remains unchallenged and I accept it. I am satisfied that the plaintiff company has proved its case and the suit, accordingly, succeeds.

I make the following final orders:-

1. Prayer (i) being for the principal sum is granted in the sum of US \$159,010.880.

2. Prayer (ii) being for storage chargee granted in the sum of Kshs.2,016,100.80.
3. Under prayer (iii) for costs and interest I grant the plaintiff company the costs of the suit.
4. Under omnibus prayer (iv) I order as follows:=

(a) The fixed deposit with the HFCK which as at the time of hearing stood at Kshs.1,005,488.48 shall be released to the plaintiff company's advocates together with any interest it may have earned since the hearing of the suit.

(b) The fixed deposit with the HFCK being security for costs which as at the time of hearing stood at Kshs.121,218.58 shall be released to Messrs Kilonzo & Co. Advocates to go towards the plaintiff company's costs of the suit.

5. I award the plaintiff company interest on the principal sum under order 1 and on the storage charges under order 2 above at court rates from the date of this judgment until payment in full.

Orders accordingly.

Delivered at Nairobi this 18th day of April, 2006.

B.P. KUBO

JUDGE