



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

Civil Case 887 of 2001

TIMWOOD PRODUCTS LIMITED PLAINTIFF

VERSUS

ABERDARE CREAMERIES LIMITED DEFENDANT

JUDGEMENT

This Plaintiff claims from the defendant the sum of KShs.607,501/30 being the amount due and owing from the defendant to the plaintiff for goods supplied and services rendered to the defendant by the plaintiff at the defendant's request with interest thereon at 36% per annum or the prevailing commercial rates until payment in full. The defendant denies the claim principally on the ground that it never ordered for any or received any goods and services from the plaintiff that could give rise to the sum claimed or any other sum at all.

The parties framed and filed the following issues for trial:-

- 1) *Whether or not the plaintiff supplied any goods or rendered any services to the defendant;*
- 2) *Whether or not the defendant ever ordered for and or received any goods or services from the plaintiff;*
- 3) *Whether or not the defendant is indebted to the plaintiff in the sum of KShs.607,501/30;*
- 4) *Whether or not the sum indebted to the plaintiff by the defendant attracts interest of the rate of 36% p.a. or the prevailing commercial rates until payments in full;*
- 5) *Whether or not the plaintiff's suit does not disclose any reasonable cause of action;*
- 6) *Whether or not demand and notice of intention to sue were given;*
- 7) *Who is liable for the costs herein.*

The plaintiff called two witnesses. PW1 was Dawood Ali Mohamed the Sales Manager. In his evidence in chief, he testified that the plaintiff deals in steam air and water systems. The defendant was

the plaintiff's customer and was running a dairy in Kinangop. Initially the defendant paid cash for goods supplied but one day Mr. Kairu the defendant's Managing Director was without money and was allowed to obtain goods for the defendant on short term credit. This was on the basis that the defendant's staff had become known to the plaintiff's staff and no risk was envisaged. For the period 1996/1997 the defendant would sometimes pay cash and other times would take goods on short time credit. He produced delivery notes some prepared by himself and others prepared by staff members that have since left the plaintiff's employment. He also produced invoices prepared by himself and those prepared by his former colleagues. He further testified that the plaintiff's personnel acted on written or verbal orders made by the defendant. Sometimes orders would be made by telephone mostly by the defendant's Managing Director. He produced various orders in support of the plaintiff's claim and said that all deliveries were made to personnel of the defendant including the Managing Director, his deceased son, the defendant's drivers and other employees of the defendant. He also testified that the deliveries would be signed for by the defendant's employees and motor vehicles used in the delivery would, be indicated. It was PW1's further evidence in chief that the defendant did not pay for the supply of the goods indicated in the delivery notes and as at 10.9.1997, the sum due and owing by the defendant to the plaintiff was KShs.607,501/30 which is the sum claimed in this suit. The plaintiff demanded payment of this sum from the defendant but in vain. A visit which included PW1 and PW2 was made to the defendants' premises where senior staff of the defendant including a Mr. Kinuthia was in attendance. A report of the visit was prepared by PW1. According to PW1, the said sum of Kshs.607,501/30 is owed by the defendant to the plaintiff and should be paid with interest at 36% p.a. plus costs of the suit.

On cross-examination PW1 conceded that there was no written agreement between the plaintiff and the defendant for the supply of goods or for rendering services on credit but such written agreement was not necessary as the Managing Director was close to the plaintiff's staff and was trusted. He also conceded that he could not know some of the persons who took delivery of some of the goods. He further admitted that there was no board resolution to supply goods to credit but authority was oral. He also confirmed that some orders made by the defendant were verbal and mostly by the Managing Director.

PW2 was Vallabh Bakrania, the plaintiff's Financial Director. He testified that he knew the defendant and its Managing Director who had previously worked for K.C.C. The defendant had commenced business with the plaintiff in early 1996. The defendant was supplied with hardware, steel equipment, pipes, bends etc. The terms of payment initially were cash on delivery but later short term credit was extended to the defendant and payment was to be made within 30 days of delivery. There was however, no written agreement for this facility. The defendant was building a creamery in Limuru known as Aberdare Creameries. In September 1997 the defendant owed the plaintiff KShs.607,500/= for goods supplied. A statement was prepared for this account and posted to the defendant at its Nairobi Post Office Box No. Since the defendant did not pay the said sum, the plaintiff stopped further deliveries and demanded payment for the said sum. A list of documents of supplies made was prepared and forwarded to the defendant. A visit was made to the defendant's factory on 17.11.2000 and PW2 and the plaintiff's Accountant met a Mr. Kinuthia the defendant's Accountant. The deliveries were discussed and Mr. Kinuthia said he would verify the documents and whether the deliveries were made. Minutes of the meeting were made. PW2 also verified that the motor vehicles used in the deliveries were owned by the defendant. PW2 further testified that despite demands for payment made by telephone fax e.t.c. the defendant did not respond. On 21.12.2000 the plaintiff instructed its lawyers to demand payment but the demand elicited no response from the defendant. The Lawyers were asked to institute this suit for KShs.607,501/30 with costs plus interest. PW2 produced a business card of the defendant's Managing Director which he said the latter had given to the plaintiff's sales staff. He also produced a list of documents forwarded to the defendants, minutes of the meeting of 17.11.2000, a copy of records from the Commissioner of Motor Vehicles for vehicles KAD 421H and KAH 664L, a statement of account, delivery notes and invoices prepared by former personnel of the plaintiff who were no longer working for the plaintiff.

On cross-examination, PW2 stated that the defendant's Managing Director was introduced to him by his brother the plaintiff's Managing Director. The said Managing Director of the defendant Mr. Kairu requested to be supplied with goods on credit as he was building a factory at Limuru and needed the plaintiff's support. PW2's brother accepted to grant the defendant the facility. There was however no

written agreement. He confirmed that the plaintiff did not do business by written agreements but by Delivery Notes and in fact certain sales decisions were made by the plaintiff's sales staff and there was nothing wrong with giving credit facilities verbally.

On conclusion of the evidence for the plaintiff the defendant called one witness; its Managing Director Njoroge Wa Kairu. He testified that the defendant used to buy steam related products from the plaintiff in 1995/96 on cash basis and at no time did the defendant have credit facilities with the plaintiff. He denied that the defendant received goods or services from the plaintiff between November 1996 and September 1997 worth KShs.607,501/30. He denied that the company was constructing a factory at Limuru. He further denied ever working for K.C.C. He contended that he was personally known to the plaintiff's staff but conceded that there was a business relationship between the plaintiff and the defendant. He denied that the defendant ever issued any LPO to the plaintiff. He stated that some of the documents produced by the plaintiff related to documents used internally by the defendant and were not to be used for making orders for goods. He denied signatures on documents the plaintiff's witnesses testified to have been signed by him. With respect to the motor vehicles appearing in the deliveries produced by the plaintiff, he denied that the motor vehicles were used to deliver the goods in question. However he conceded that the motor vehicles had been used before to carry goods for the defendant and the plaintiff's personnel knew them and during the time the goods supplied were paid for in cash on delivery. He denied that the defendant owed the plaintiff anything and prayed that the plaintiff's suit should be dismissed with costs.

On cross-examination, DW1 denied the plaintiff's entire claim. He denied signatures on certain deliveries allegedly signed by him. All the orders produced by the plaintiff were denied and he stated that they did emanate from the defendant. He however conceded that one Kiarie was his brother, one David was one of the defendant's salesmen. He further admitted that one Kiarie Munene and Wanyoike were employees of the defendant. He also conceded that the defendant had used similar deliveries before except what was described as Cotton waste. He further confirmed receipt of invoices. He testified that the documents produced by the plaintiff were fake and could attract criminal sanctions but he had not complained about the same to the police. He conceded that previously he had been dealing with one Harish who used to work for the plaintiff.

At the close of the evidence the advocates for the parties agreed to file written submissions which were finally filed on 22.2.2006. The Advocates took their clients respective positions in their submissions.

From the above evidence and submissions the issues framed by the parties for trial may now be answered. The 1st issue is whether or not the plaintiff supplied any goods or rendered any services to the defendant. PW1 testified that he came to know DW1 and other workers of the defendant as the plaintiff frequently supplied goods to the defendant through DW1 and the said workers. On some occasions, PW1 personally attended DW1. Other salesmen of the plaintiff also served various employees of the defendant. PW1 produced no less than 22 exhibits which included Delivery Notes, invoices and what he described as Local Purchase Orders. Nearly all the Delivery Notes have some form of acknowledgment of the goods indicated therein to wit a signature, a name or motor vehicle number. Then there are the "Local Purchase Orders" produced as Exhibits Numbers 7, 21 and 22. These exhibits are on the defendant's letter heads. With respect to exhibits 21 and 22, the defendant's Managing Director DW1 contended that they are for internal use of the defendant and are not Local Purchase Orders. He however, did not explain how the plaintiff came by the documents. PW1 on his part testified that these exhibits were treated as Local Purchase Orders. I believed PW1's explanation. I found him a credible witness. With respect to exhibit 7, DW1's explanation was that it was fake. Yet it has the defendant's particulars of name and address. It is clearly titled "Local Purchase Order." DW1's explanation was not reasonable. He conceded that the defendant had such Local Purchase Orders but exhibit 7 was not one of them. He could have produced their file copy to answer the plaintiff's claim. The defendant has had knowledge of these documents even before the institution of this suit. If indeed the defendant's Managing Director wished to be taken seriously, he could have complained to the investigation authorities that documents bearing the defendant's name were in unauthorized hands. Such a complaint would lend credence to the denial now made by the defendant. Indeed I thought counsel for the defendant was laying foundation for

the existence of such a complaint when in cross examination of PW1 he asked whether any of the plaintiff's salesmen had been charged with fraud.

PW1 further testified that on a few occasions motor vehicles belonging to the defendant were used for the deliveries. These were KAH 664L and KAD 421H. PW2 produced copies of records from the Registrar of Motor Vehicles which confirmed that the two motor vehicles at the material time were owned by the defendant. DW1's explanation for the appearance of the motor vehicle numbers on the deliveries was that the defendant's personnel knew them since the motor vehicles had been used previously when the defendant dealt with the plaintiff on cash basis. This explanation cannot be believed, because if the defendant's personnel intended to be untruthful the numbers of the said motor vehicles would have been inserted on all the delivery notes.

There is also the evidence of PW2 Vallabh Bakrania the plaintiff's Financial Director. He corroborated the evidence of PW1 and further testified of a meeting held at the defendant's company premises whereat the plaintiff's claim was reiterated. He produced minutes of the said meeting. The minutes show that the defendant's representative a Mr. Kinuthia the defendant's Accountant attended the said meeting and did not deny receipt of the plaintiffs' documents in support of this claim. He further did not deny that the defendant was accorded short term credit facilities by the plaintiff. The meeting also noted that purchasing was consistent. Mr. Kinuthia requested for time to verify the documents. PW2 testified that there was no further response from the defendant. PW2 also produced a letter of demand dated 21.12.2000 written on the plaintiff's instructions to the defendant by M/s Kipkenda, Lilan and Company Advocates. He testified that the defendants did not respond to that demand letter and did not do so upto the time this suit was filed. The defendant did not produce any such response. The above evidence incline me to answer issue numbers 1 and 2 in the affirmative.

The answer to issue Number 3 is also in the affirmative. The defendant did not seriously challenge the price of the goods supplied to the defendant. Its counsel was content with a submission that the invoices were inadmissible as they were not certified. With respect the challenge was not serious as the invoices were merely additional material upon which the plaintiff sought to rely. Challenge should have been against whether the prices charged by the plaintiff were not the commercial prices of the goods supplied. Indeed, when DW1 took the stand he did not challenge the price of the goods in question.

Having answered issues numbers 1, 2 and 3 in the affirmative the answer to issue No.5 is obvious. It cannot be said that the plaintiff's suit does not disclose any reasonable cause of action. I have also dealt with issue number 6 that indeed a demand and notice of intention to sue were given but the same did not elicit any response from the defendant.

I have perused the plaint herein as I answer issue number 4 as to whether or not the sum indebted to the plaintiff by the defendant attracts interest at the rate of 36% p.a or the prevailing commercial rates until payment in full. The plaint does not lay sufficient basis for this claim. The effective date is also not given. I have also perused the letter of demand before action written by M.s Kipkenda, Lilan & Co. Advocates. The demand was for the principle sum of KShs.607,501/30. No interest was demanded. The plaintiffs' witnesses did not also explain why the plaintiff was entitled to the interest rate claimed. In the premises the answer to issue number 4 is in the negative.

In the result, I enter judgment for the plaintiff against the defendant in the sum of KShs.607,501/30 together with interest thereon at court rates from the date of filing suit until payment in full.

The plaintiff will also have the costs of the suit.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 5TH DAY OF APRIL, 2006.

F. AZANGALALA

JUDGE

5/4/2006