



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 4260 of 1992

NATIONAL CEREALS & PRODUCE BOARD..... PLAINTIFF

VERSUS

MBWANJI LIMITED.....DEFENDANT

JUDGEMENT

In a plaint filed on 7th August, 1992 the plaintiff claimed against the defendant KShs.15,198,970.10 being money payable to the plaintiff by the defendant for goods sold and delivered at the defendant's request. At the hearing the plaintiff applied for leave to amend the sum claimed to KShs.13,099,945.40. I granted the leave sought and the sum claimed is as amended.

The defendant filed a defence to the claim in which it denied the plaintiff's claim. It denied having made the purchases and having received the goods. Without prejudice to the denials the defendant averred that in or about 1980, the plaintiff sold to the defendant some maize which was found to be wet and which the defendant could not make use of as the same was unfit for human consumption. Hence the consideration failed. The defendant further pleaded that the plaintiff's claim was time barred. The defendant also pleaded that in its business with the plaintiff, it always paid for the goods the plaintiff supplied and did not owe any money to the plaintiff.

When all the pretrial proceedings were completed, the suit was set down for hearing on 5.6.2006. On the hearing date the defendant did not appear by itself or by its advocates. On being satisfied that the hearing date had been taken by consent, I proceeded with the hearing of the plaintiff's case *ex parte*.

The plaintiff called one witness: Clement Shikuku Khaemba its Chief Accountant. He testified that he had worked for the plaintiff since December, 1984 and was conversant with the plaintiff's claim. He knew that the plaintiff supplied maize to the defendant and the supplies had commenced in the year 1982 at the request of the defendant. The request was by letters which were produced in evidence. The defendant settled for the supplies made upto the year 1986 when it started failing to pay for deliveries. By that year the defendant owed KShs.4,792,000/=. Subsequently it paid KShs.3,000,000/= leaving a balance sum of KShs.1,792,000/= for which a demand was made on 20.5.86. The defendant by its letter dated 7.6.1986 responded that it was making losses and sought discussion on a repayment programme. Discussions were held and it was agreed that a small quantity of maize which was not good be mixed with good maize and be milled. The defendant agreed to pay the plaintiff for the supplies but did not make any payment.

On 10.5.1988, by a letter of even date the defendant sought credit facilities on the basis that it was not being paid for its deliveries to its customer the Office of the President. The facilities were granted. Documentary evidence of the supplies made on credit was produced. This was in the form of Sales Orders and Invoice Dispatch advices also serving as delivery documents. Where deliveries were by Kenya Railways Corporation, waybills/consignment notes and extracts of registers were produced.

A reconciliation of the account was made and an undertaking to pay was given by the defendant. These were also produced as exhibits, in support of the plaintiff's claim.

The documents showed that the sum due to the plaintiff by the defendant was KShs.13,099,945.40 which the plaintiff claimed.

I have considered the evidence. From the said evidence, there is no doubt that the plaintiff supplied maize to the defendant company. The defendant acknowledged receipt of the maize and even acknowledged its indebtedness to the plaintiff. It further undertook to settle its indebtedness to the plaintiff. The documents at Annex G1 and 2 of the plaintiff's bundle of documents produced as exhibit 1 clearly show that the defendant indeed owes the sum of KShs.13,099,945.40 to the plaintiff.

In the light of the evidence availed to the court, the defence filed by the defendant is clearly untenable and was in any event not supported at the hearing of the case due to non-appearance of the defendant and its counsel.

On the basis of the evidence adduced, I am satisfied that the plaintiff has established its case against the defendant on a balance of probabilities. Accordingly, judgment is entered in favour of the plaintiff against the defendant in the sum of KShs.13,099,945.40 with interest thereon at court rates until payment in full.

The defendant will bear the plaintiff's costs of the suit.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF JUNE, 2006.

F. AZANGALALA

JUDGE

Read in the presence of:-