



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

**Civil Case 157 of 2002**

**DESBRO KENYA LIMITED.....APPELLANT**

**VERSUS**

**NJOKA TANNERS..... RESPONDENT**

**J U D G M E N T**

**FACTS**

The Plaintiff's claim against the Defendant, as per the amended plaint dated 16/4/02, is twofold; K.Shs.946,799/70 being the amount outstanding on account of goods sold and delivered to the Defendant at the defendant's request on diverse dates between May and October 2000, and the sum of US.\$ 2,400 or its equivalent in Kenya Shillings being the value of 11,350 pieces of leather [Grade 4 & 5) that were delivered to the Defendant for sale on behalf of the Plaintiff sometime in the year 2000.

The Plaintiffs, a Limited Liability company, deals with industrial chemicals while the defendants, also a limited liability company, deals with hides and skins.

In its Amended defence, and counter claim, the Defendant avers that it was supplied with chemicals by the Plaintiff and as at the year 2000 the sum payable to the Plaintiff was K.Shs.745,366/15 which was mutually set off as the Plaintiff owed the Defendant K.Shs.1,034,750/- for services rendered to the Plaintiff by the Defendant at the Defendant's tannery at Embu, leaving a balance of K.Shs.289,383/85 which the Defendant counter-claims from the Plaintiff.

The defendants counter-claim stated that on diverse dates during the year 2000, at the Plaintiff's request, it rendered re-tannage services at Embu to the Plaintiff for tanning 11,350 pieces of leather at K.Shs.35/- per piece, making a total of K.Shs.397,250/-. The Defendant further stored the Plaintiff's leather for 255 days at K.Shs.2,500/- per day making a total of K.Shs.637,500/-. Finally, the Defendant avers that as at 26/1/01, the amount due from the Plaintiff to the defendant was K.Shs.1,034,750/- which was mutually set-off by the Defendant's debt to the Plaintiff of K.Shs.745,366/15 leaving a balance of K.Shs.289,388/85 as money owing from the Plaintiff to the Defendant.

Each party called one witness: Mr. Robert Njoka, the Managing Director of the Defendant Company, and Mr. Senik, the Director of the Plaintiff company. Each of these witnesses produced their respective evidentiary documents. At the conclusion of the witnesses' evidence in chief and cross-examination by the Learned Counsels for both sides, the parties submitted their written submissions; in line with the agreed issues which are as under:

- (a) **Whether the Defendant is indebted to the Plaintiff in the sum of K.Shs.946,799/70;**
- (b) **Whether the sum of K.Shs.745,366/15 is due from the Defendant to the Plaintiff and not K.Shs.946,799/70 as claimed by the Plaintiff;**
- (c) **Whether the Defendant is indebted to the plaintiff in the sum of US \$25,000;**
- (d) **Whether there was any agreement on storage charges between the defendant and the Plaintiff;**
- (e) **Whether the Plaintiff-Desbro(K) Limited has the LOCUS STANDI to bring the suit in the place of Industrial Distributors Limited (IDL).**

I have carefully considered and evaluated the pleadings and the evidence adduced in the course of the hearing in this case. I consider it prudent to deal with the issues, not necessarily in the order in which they were presented, but rather in the order of their relative importance in the overall outcome of the entire case. 'Thus, for instance, I think it is of greater importance to deal with whether or not the Plaintiff has the **LOCUS STANDI** to bring the suit in the place of Industrial Distributors Limited; than any other issue. This is because if the Plaintiff has no **locus standi** to bring this suit, then that closes the entire litigation, at least as between the current Plaintiff and the defendant herein.

The evidence before me shows that there was no formal documentation of transfer of the Industrial Distributors Limited to the Plaintiff – Desbro (K) Limited. However, the Defendant, through their witness – Mr. Robert Njoka – conceded that the invoices with respect to the Plaintiff's claim are from Industrial Distributors Limited. This was explained by the Plaintiff as follows: Desbro (K) Limited took over all business of industrial Distributors Limited. Plaintiff's witness, Mr. Senik, produced a letter dated 31/1/2001 from Kenya Revenue Authority, Value Added Tax Department, where the Assistant Commissioner wrote, **inter alia**

*".....we have carefully considered the case and hereby authorise you to effect the transfer of the above mentioned business to M/S Desbro Kenya Limited, without charging VAT on the assets in accordance with paragraph 21 of the Sixth Schedule to the Vat Act, Cap. 476, Laws of Kenya."*

A casory look at the above provision of the VAT Act shows that it deals with the disposal of registered business as a going concern to another legal entity or person. Here the transfer of the business of Industrial Distributors Limited to Desbro (K) Limited. Such transfer also entails the transfer of both obligations and the rights of the transferred entity to the entity taking over – the transferee.

The Defendant, in his evidence on 15/12/05, Mr. Robert Njoka, the Defendant's Managing Director, specifically stated that there was no distinction between IDL and Desbro Limited as they dealt with the same directors. He went on to state, in his evidence in Chief on 20/1/04, that IDL was supposed to pay them – the Defendants – the sum of K.Shs.289,383/50.

In my view, the evidence reviewed above answers the last issue in this case, in the affirmative – that the Plaintiff has **the locus standi** to bring the suit herein in the place of IDL. The two companies had merged and were one and the same legal entity for all practical purposes.

Turning to the twin issues of how much is owed by the Defendant vis-à-vis – from the counter claim, the evidence before me is that whereas the Plaintiff has clearly quantified, by way of invoices, how the figure of K.Shs.946,799/70 is arrived at, there is no single piece of evidence to show how the figure of K.Shs.745,366/15 is arrived at, by the Defendant. That to me is critical on whether the counter claim can stand the test. The counterclaim is based on deductions from the Defendant's figures of K.Shs.1,034,750/- which figure has not been quantified. I say unquantifiable because there is no evidence, for instance, to show how much storage was payable per day and for what quantity of the hides/skin claimed to have been stored by the Defendant for the Plaintiff. Nor is there any evidence to show the exact date or dates when the goods were stored.

In brief, and I am not being harsh on the Defendant, the counter claim and the defence are based on figures that are not verifiable. The figures are clearly cooked, but in an uncooked pot. These figures have not, on the basis of the evidence before me, been proved at all, and I reject the same as untenable.

Turning to issue on whether the Defendant is indebted to the Plaintiff in the sum of US \$25,000 this issue should also go with the issue of storage charges claimed by the Defendant against the Plaintiff.

The evidence before me, which is a common ground, is that at the request of the Plaintiffs, the Defendant collected 22,650 pieces of Sheepskin from, Bulleys Tanneries, at Thika. Bulleys Tanneries were carrying out their obligations to Backman Labs of South Africa, represented by the Plaintiff [IDL]. Mr. Senik testified, and produced a fax dated 8/5/00 addressed to the Defendant. Part of that Fax stated, at the relevant lines:

**“can you please arrange to collect the wet blue skins with your truck from bulleys: try and dispose off the same as they are without further processing and remit the proceeds at the earliest.”**

Learned Counsel for the Plaintiff submitted, on the basis of the above fax, that the purpose of putting the Defendant in possession of the hides and skins collected from the Bulleys was to try and sell the skins as they needed no further processing.

I respectfully agree with the Plaintiff's contention, that the role of the Defendant was to sell the hides and skins, and not to process the material any further, as they were already processed, even through at lower grades 4 and 5. turning back to the issue at hand, it is in the accounting for the pieces of hides and skins sold by the Defendant that the question of 11,300 pieces come in, out of the original 22,650 pieces collected by the Defendant from Bulleys. Further, in light of the above evidence I have failed to locate any evidence to support the Defendant's claim of charges for re-tanning the hides and skins collected from Bulleys, and if there was such evidence, which I repeat there isn't, at what rate or cost, per piece. This disposes of issue No. (d) of the issues, as framed and agreed upon by the parties at the hearing and their submissions.

On whether there was any agreement on storage charges between the parties, there is no formal agreement, from the evidence adduced before me. There are serious issues raised by that silence regarding the storage. The entire transaction was a business transaction. It does not sound reasonable to expect the Defendant to store the goods, for whatever period, for free. But if the issue of storage was that important, it is only reasonable to expect that it would have been raised by the parties. But that was never done. That raises the issue as to why the Defendant did not raise such an issue prior to his being sued, and if it is true that he stored the goods for 255 days.

It is not safe to speculate. But from the evidence, the Defendant was to try and sell the hides and skins, as grade 4 and 5, but if he could fetch any better price, he was to keep the surplus. That might have been the incentive and the reason why the Defendant did not claim or complain of the storage charges for all those days.

It is not clear at what price the hides and skins that were disposed off. But whatever the case, there is no evidence on the rate of the storage charges, and it seems as an after thought on the part of the Defendant to raise such an issue, as a counter-claim after he had been sued, and not earlier.

All in all therefore, and on the basis of the evidence before me, and the analysis of the same, it is my view that the Plaintiff has proved its case against the Defendant, on the balance of probability.

Accordingly, this suit succeeds and the Plaintiff is awarded:

- (a) K.Shs.946,799/70 being the outstanding balance for goods sold and delivered to the Defendant.
- (b) US \$25,000 or its equivalent in Kenya Shillings, being the value of 11,350 pieces of leather (Grade 4 and 5) that were delivered to the Defendant for sale on behalf of the Plaintiff.

(c) Costs of this suit.

(d) Interest on (a) , (b) and (c ) at court rates from the date of filing this suit.

DATED and delivered in Nairobi this 6<sup>th</sup> Day of November, 2006.

**O.K. MUTUNGI**

**JUDGE**