



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CIVIL SUIT 1168 OF 2001

STOKMAN ROZEN KENYA LTD.....PLAINTIFF

VERSUS

THE DA GAMA ROSE GROUP OF COMPANIES LTD.....DEFENDANT

J U D G E M E N T

The Plaintiff, STOKMAN ROZEN KENYA LIMITED, claims from the Defendant, THE DA GAMA ROSE GROUP OF COMPANIES LTD., the sum of Netherland Guilders (NLG) 170,719/00 or the equivalent thereof in Kenya Shillings. The same is pleaded in the amended plaint dated 27th February, 2002 as being “the cost and or the agreed cost of looking after or maintaining or keeping the Defendant’s order of dormant eyes rose plants in animated suspension or preserving the plants or Defendant’s order of plants pending collection by the Defendant who failed to collect the same on time or at all, detailed particulars whereof have been rendered and are well within the Defendant’s knowledge at the Defendant’s request and instance during the year 1997.” The Plaintiff further pleaded that deliveries were to be at the Defendant’s Casa Rosa Estates, Thika. Interest at 25% p.a. from 2nd December, 1999 is also claimed. In its amended defence and counterclaim dated 24th July, 2002 the Defendant denied liability to the Plaintiff in the sum claimed or any part thereof at all. It further denied that the Plaintiff sold and delivered to it any goods as alleged or at all during the year 1997 or at any other time. But it admitted that as agreed deliveries were to be made at its Cosa Rosa Estates in Thika. Then in paragraph 3B of the amended defence and counterclaim the Defendant pleaded as follows:-

“3B. In further answer to the allegations the Defendant states that:

- (a) Before any deposit could be accepted or any plants grown by the Plaintiff, it was a fundamental requirement that the Plaintiff secures execution of the breeder’s contracts, and which was not done.**
- (b) Prior to payment of 10% deposit, the Plaintiff was not expected to grow the plants. Indeed, this suit is a departure from the Plaintiff’s stated position that no plants would be grown until full deposit is paid.**
- (c) The contract did not entitle and/or authorize to maintain the plants in animated suspension as alleged or in whatever form.**
- (d) The Plaintiff sold all the plants to other parties and this suit seeks an unjust enrichment.”**

The Defendant further pleaded in paragraphs 4,5,6,7 and 8 that the Plaintiff had agreed to grow certain

varieties of rose plants and to supply the same to the Defendant by delivering the same at the Defendant's Cosa Rosa Estates in Thika for replanting; that transfer of the property in the said plants was to take place at future times; that the contract between the Plaintiff and the Defendant was a mere agreement to sell; that there was no sale of any goods at any time; that in any case the agreement aforesaid was subject to and conditional upon the permission to the Plaintiff and the Defendant of the breeders of the said varieties of roses and plants to grow or replant the same; that towards the agreed purchase twice the Defendant made an advance payment to the Plaintiff in the sum of NGL.38,361/64, the balance of the purchase price to be paid by instalments partly against delivery and thereafter six and twelve months after delivery; that no delivery of any goods was ever made by the Plaintiff; that no permission was granted by the breeders to the Plaintiff and the Defendant to plant or grow the plants, and that therefore the agreement between the parties became null and void; and that the plaintiff has no cause of action against the Defendant. Finally, the Defendant counterclaimed the sum of Kshs.1,259,232/00 (the same being equivalent to NGL 38,361/64) for failure of consideration.

In its amended reply to defence and defence to counterclaim dated 17th October, 2002 the Plaintiff pleaded that the Defendant delayed in collecting the plants it had ordered; that by its letter dated 2.12.1999 the Defendant accepted that the Plaintiff had incurred costs in maintaining the plants in the sum claimed and was therefore estopped from denying the same; and that the Defendant made part-payment of NLG. 38,361 leaving the balance claimed. The Plaintiff then denied paragraph 3B of the amended defence and counterclaim and put the Defendant to strict proof thereof. More specifically, it stated that breeders contracts were to be signed and returned before delivery, and since no delivery took place, the occasion to sign and return the breeders contracts had not arisen; and that in any event it had permission of the breeders at all material times. The Plaintiff further replied that maintaining the plants was directly caused by the Defendant's failure to make its farm ready for taking delivery and replanting of the roses. It also denied the Defendant's counterclaim. An agreed statement of issues dated 10th January, 2003 was filed. The issues to be decided are stated therein to be-

- (a) Whether the Plaintiff is entitled to the sum of NLG.170,719 for the alleged services pleaded in the amended plaint.**
- (b) Whether the Plaintiff could render the alleged services prior to payment of the agreed deposit.**
- (c) Whether the parties had agreed on terms of purchase of the plants, and if so, whether the alleged services are within such terms and/or can be implied from the terms.**
- (d) Whether the Defendant is in breach of the agreement, and if so which term.**
- (e) Whether the Defendant is entitled to the claim pleaded in the counterclaim.**
- (f) Who shall pay the costs of the suit?**
- (g) Who shall pay the costs of the counterclaim?**

When hearing commenced the Plaintiff's list of documents dated 2.12.2002 and copies of the documents attached thereto were by consent admitted into evidence as Exhibit "A". Similarly, the Defendant's list of documents dated 12th June, 2003 and copies of documents attached thereto were admitted into evidence as Exhibit "B". In the course of hearing the parties produced a few additional documents. The Plaintiff called one witness, KEITH NJUGUNA MUNENE (PW1). The Defendant also called one witness, HORATIUS DA GAMA ROSE (DW1). I have considered their respective testimonies. I have also considered both the written and oral submissions made on behalf of the parties. PW1, an accountant, was the finance manager of the Plaintiff at the time he testified. He had joined the Plaintiff in the year 2000. His testimony was therefore derived from the records kept by the Plaintiff. The events giving rise to the suit had taken place before he joined the Plaintiff. On the other hand DW1, the group managing director of the Defendant, had personally dealt with the relevant officers of the Plaintiff.

He is also an advocate of this court.

PW1's testimony was, briefly, that in February, 1997 the parties entered into a contract by which the Plaintiff would supply to the Defendant rose plants. Under the contract the Defendant was to pay a 10% deposit but actually paid only 5%, some NLG.38,361/64 on 12.9.1997. The Plaintiff duly prepared rose plants as ordered by the Defendant in good faith and upon the understanding that payment would follow.

Delivery of the plants was to be in August and September 1997 at the Defendant's farm at Thika. But the Defendant was not ready to take delivery as its farm was not ready.

The Plaintiff therefore kept the plants under refrigerated conditions ("suspended animation", as he called it) to slow down growth. This condition could be sustained only for a limited period. The Plaintiff therefore sold some for the plants to other customers. The bulk of them, however, grew into bushes and had to be destroyed. The Defendant never took delivery of any of the plants. But it agreed to pay the Plaintiff the losses it incurred thereby.

On his part, DW1 testified that he had discussions with officers of the Plaintiff regarding price, delivery, quality of planting material and terms of payment. But the Defendant was not ready to make any purchases yet and did not place any order for supply of plants. Various offers and counter-offers were made, but no contract was entered into. The 5% deposit was made as a show of good faith at the request of the Plaintiff as it was in danger of losing its propagation licence from the breeder (the intellectual property owner). The Plaintiff was thus pushing the Defendant hard to make a sale. The Defendant paid the 5% deposit purely as an accommodation to the Plaintiff.

It was not yet ready to place an order as its farm was not ready, and it did not place any order.

From the totality of the evidence placed before the court and the pleadings of the parties I am satisfied on a balance of probabilities that the following facts have been proved.

(1) Indeed the Defendant placed an order for the supply by the Plaintiff of various plants as is evidenced by the Order Confirmation dated 6th February, 1997 (page 1 of Exhibit B). This order confirmation is signed by both parties. It sets out the plant materials to be supplied, the prices thereof, terms of payment, date of delivery and other terms and conditions.

(2) The above contract was re-negotiated, partly because the Defendant's farm was not yet ready. These further negotiations resulted in the Order Confirmation dated 13.6.1997 (pages 5 of Exhibit B), which is signed by both parties. This order confirmation sets out plant materials to be supplied, new prices thereof, terms of payment, new date of delivery and other terms and conditions. It replaced the earlier order confirmation.

(3) Yet again there were further negotiations prompted to a large measure by the fact that the Defendant's farm was still not yet ready. A third Order Confirmation (Exhibit D3, which is also the document at page 10 of Exhibit A) was signed by both parties. The Defendant signed it on 5th September, 1997. This third order confirmation bears the same date (13th June, 1997) as the second order confirmation, possibly because it was replacing it. It has new plant materials to be supplied, new prices, etc.

(4) It was after signing the third order confirmation that the Defendant paid the 5% deposit of NLG.38,361/64. Clearly, the parties were now settled in their minds about what each wanted and those minds met in that third order confirmation. It constituted a binding contract between them.

(5) The Defendant paid the 5% deposit in part-performance of the contract and not as a show of mere good faith without the intention of performing any contract. On its part the Plaintiff had already started to perform its part of the contract by preparing the necessary plants.

(6) Delivery was never made. But this was entirely the fault of the Defendant.

It had apparently not been able to prepare and make ready its farm to take delivery of and grow the rose plants ordered. The Plaintiff took appropriate steps to preserve the plants for the Defendant by suspending or slowing down growth by way of refrigeration (“animated suspension) – but at considerable expense. Despite all this the Defendant was ultimately unable to take delivery of the plants, and they grew into bushes. The Plaintiff was able to sell some in mitigation of loss. But the bulk of them had to be eventually destroyed.

(7) The parties then entered into negotiations as to how to wind up this unhappy business between them. In a letter dated 13.5.1999 (page 15 of Exhibit A and page 26 of Exhibit B) the Plaintiff calculated its loss at NLG 209,080. After giving credit for the deposit of NLG 38,361 made by the Defendant the outstanding loss was NLG 170,719. In the same letter the Plaintiff offered a discount of NLG 100,000 should the Defendant purchase a further four (4) Ha. of plants within one year.

(8) By its letter dated 2.12.1999 (page 16 in Exhibit A and page 27 in Exhibit B) the Defendant accepted the sum charged by the Plaintiff for its loss. But it requested for a raise of the discount for future purchases from NLG 100,000 to NLG 169,080. DW1 argued in his testimony that the discount or deduction was in respect to the amount charged by the Plaintiff for its loss, and not in respect to future purchases. But this cannot possibly be so in view of the very wording of the relevant correspondence (including the letter dated 3rd December 1999-page 17 of Exhibit A).

That being the factual position I can now decide the issues. (1) The Plaintiff is indeed entitled to the sum claimed. It partly performed its part of the contract and was not able to deliver the plants ordered by the Defendant only because the Defendant was not ready to take delivery.

Furthermore, the Defendant agreed in writing that it would pay that sum to the Plaintiff for its loss occasioned by the Defendant’s default.

(2) Upon the Defendant paying 5% deposit and undertaking in writing to pay the other 5% the Plaintiff was entitled to embark upon performance of its part of the contract by preparing the rose plants ordered.

(3) There was a binding contract between the parties whose full terms and conditions had been agreed. The loss suffered by the Plaintiff, and which the Defendant agreed in writing to pay, was occasioned by the default of the Defendant. That loss is in the nature of special damages the quantum of which, happily, the parties had already agreed on before suit was filed. It was therefore not necessary to particularize these special damages.

(4) As already seen he Defendant was in breach of the contract in that it was unable to take delivery of the plants ordered.

(5) The Defendant is not entitled to the counterclaim, firstly, because the same was applied, legitimately, towards payment of the Plaintiff’s loss. Secondly, it was the Defendant that was in default and would ordinarily forfeit the deposit towards damages due to the Plaintiff.

The Plaintiff has thus proved its case on balance of probabilities. I will give it judgment. It has sought the principal sum of NLG 170,719. I understand from the submissions made for the Defendant that the Euro replaced the Dutch Guilder which is no longer available. The Plaintiff has sought in the alternative the equivalent of the Dutch Guilders in Kenya Shillings. I will therefore give it judgment for the equivalent of NLG 170,719 in Kenya Shillings, the rate of conversion being that obtaining at the time of filing suit. There shall be interest thereon at court rates from the date of filing suit until payment in full. The Plaintiff will have the costs of his suit. The Defendant on the other hand has failed to prove its counterclaim to the required standard. It is hereby dismissed with costs to the Plaintiff.

Orders accordingly.

DATED, SIGNED AND PRONOUNCED IN OPEN COURT THIS 15TH DAY OF JULY, 2005.

H.P.G. WAWERU

JUDGE