



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS
CIVIL SUIT NO 1239 OF 2002

KENYA OIL CO LIMITED PLAINTIFF

VERSUS

CHIEF PETROLEUM LIMITED DEFENDANT

RULING

Counsel for the Plaintiff served upon the defence counsel, a request of particulars dated 4th March, 2003. The request relates to particulars of the defence and counter-claim as is set out in that request annexed to the Plaintiffs application dated 2nd April, 2003. The request was served on 4th March, 2003 and when none were supplied, the Plaintiff filed the application dated 2nd April, 2003 for an order to compel the defendant to supply the particulars requested.

The record shows that on 25th March, 2003, the defendant also filed a request for particulars of the Plaintiff to be supplied. When the Plaintiff failed to supply the particulars of the Plaintiff requested, the defendant too filed an application on 7th April, 2003 for an order to compel the Plaintiff to provide the particulars requested. Both applications came for hearing on 9th April, 2003 and the defence counsel informed court that in respect of the defendants application, the particulars sought had been supplied and what was left for determination was the said application in so far as it related to costs. Counsel for the Plaintiff was in agreement with him. As for the Plaintiff's application dated 2nd April, 2003, it was agreed and ordered that the particulars requested at paragraphs number 2, 4(c), 4(e), 4(f), 5(b), 5(c), 5(d) and 5(e) of the defence be supplied by the defendant to the Plaintiff within 15 (fifteen) days from 9th April, 2003. I believe that, that order has been complied with. What is left of that application and is in dispute, is whether the particulars sought at paragraphs 4(a), 4(b), 4(d) and 5(a) of the defence and paragraph 13 of the counter-claim should be supplied. I propose to deal with each paragraph in dispute in the order in which they appear in the Plaintiff's request for particulars.

At paragraph 3 of the defence, the defendant stated that the defendant had been purchasing petroleum products from the Plaintiff and proceeds to set out the express and implied terms of sale in that paragraph. At paragraph 4(a), the defendant accuses the Plaintiff of breaching the terms of sale by supplying fuel to third parties without having received the defendants Local Purchase Orders. The Plaintiff seeks details of the third parties, to whom fuel was supplied, the value of what was supplied and the identity of the third parties implied in paragraph 4(a) of the defence. In reply to that request, one of the defendant's directors depones at paragraph 2(b) of the replying affidavit that, from the statement of accounts dated 30th September, 2002 availed by the Plaintiff to the defendant, the defendant can supply particulars as to when such fuel was supplied to third parties and the value of such supplies as those particulars can be found in the said statement for the month of August and September 2002. It is further deponed that the products

reflected in the said statement were not supplied to the defendant and if such products indeed left the Plaintiff's depot for delivery to the defendant, then they must have been delivered to third parties unknown to the defendant.

Since it is the entries in that statement of accounts, which gave rise to the pleading in paragraph 4(a) of the defence and as the identity of those to whom the Plaintiff supplied the fuel for the period in that statement is not known to the defendant then the only particulars the defendant can be ordered to supply with regard to paragraph 4(a) of the defence, are the value of the fuel supplied and when it was supplied to parties unknown to the defendant. The defendant shall supply those two particulars with regard to paragraph 4(a) of the defence.

At paragraph 4(b) and 4(d) of the defence the defendant accuses the Plaintiff of:-

(b) incorrectly invoicing the defendant for petroleum products sold by the Plaintiff or its subsidiaries to third parties

(d) crediting monies received from the defendant into accounts of third parties.

The Plaintiff requested for the following particulars of paragraph 4(b):-

- 1. details of when and where the Plaintiff incorrectly invoiced the defendant for petroleum products sold to third parties***
- 2. the invoice numbers and dates of those invoices***
- 3. the total amount incorrectly invoiced by the Plaintiff.***

It also sought the same information in respect of the allegation that the Plaintiff incorrectly invoiced the defendant for petroleum products sold by the Plaintiff's subsidiaries to third parties. In reply, the defendant objected to particulars of the defence, paragraph 4(a) and 4(b) being supplied because the defendant does not know where such deliveries were made, and the identity of the third parties. As it is the defendant's own pleading that the Plaintiff has invoiced the defendant for products sold to third parties, the defendant must be having in its possession, such invoices otherwise I do not see how the issue of incorrect invoicing can arise in the absence of an invoice or invoices which according to the defendant are incorrect for the reason that the products were not supplied to the defendant on a date when the invoice alleges that such goods were supplied. The defendant must supply the details sought at paragraph 4(b) of the defence as requested of that paragraph.

At paragraph 4(d) of the defence, the defendant accuses the Plaintiff of crediting the monies received from the defendant in the account of third parties. The Plaintiff seeks the following details of that paragraph:-

- 1. When and where the Plaintiff credited the monies received from the defendant to the account of third parties***
- 2. Who the third parties are***
- 3. When and in what manner moneys were received from the defendant, namely by cheque or in cash and the exact amount***
- 4. The amount credited to the accounts of the third parties.***

The defendant's response is that it would not be in a position to provide any of those details because the Plaintiff has not supplied it with the Account for October, 2002. I take it that, those details, according to the defendant, would be found in the said statement of accounts. If that is so, then I wonder how the defendant knew what is in the October 2002 account if it has not seen that particular statement so as to

say that the particulars sought would be in that statement of account. If the defendant is saying that it has made payments to the Plaintiff and that the Plaintiff has instead of crediting the account of the defendant, credited the account of someone else, then the defendant must know how much money it is talking about, when it was paid to the Plaintiff and if such payment was by cash or by cheque. The defendant should be able to supply those details and cannot say that they are in a statement of accounts which he does not have and which has not been given to him. The defendant must here be talking of a particular third party and should be in a position to furnish particulars as to identity of this particular third party. The defendant shall supply the particulars sought of paragraph 4(d) of the defence.

At paragraph 5(a) of the defence, the defendant accuses the Plaintiff of billing it for petroleum products which the Plaintiff has sold to third parties. The Plaintiff seeks the following particulars of that paragraph:-

- 1. When and where the Plaintiff incorrectly invoiced the defendant for products sold to third parties**
- 2. The invoice numbers and their dates**
- 3. Total amount so incorrectly invoiced**
- 4. The same details if the accusation also applies to the Plaintiff's subsidiaries.**

I have earlier for the reasons contained in this ruling found that some of the particulars sought of paragraph 4(a) of the defence should be supplied i.e dates when the fuel products were supplied to third parties and the value of the fuel supplied as this, the defendant will find in the statement of accounts for the month of August and September, 2002 which the Plaintiff has availed to the defendant. As the said statement does not show the names of the third parties the defendant shall not give details of the third parties. Its case is that if the fuel was not supplied to it, and the account shows that it was supplied, then that must be to a third party unknown to the defendant. There is no mention of the Plaintiff's subsidiaries in paragraph 5(a) of the defence and the particulars to be supplied shall not touch on the said subsidiaries of the Plaintiff.

I now come to the counterclaim. At paragraph 13 the defendant states that it has paid to the Plaintiff far in excess of the petroleum products supplied and states that it is entitled to the surplus but despite demand, the Plaintiff has refused or has neglected to reconcile accounts. The Plaintiff requests the following particulars of that paragraph in the counter-claim:-

- 1. The amount which the defendant has paid to the Plaintiff with details of when, where and in what manner the payments were made**
- 2. The exact amount of the surplus funds to which the defendant is entitled.**

To this request, the defendant at paragraph nine (9) of the replying affidavit depones that the counter-claim relates to the prayer for accounts and that it is only upon scrutiny of accounts, invoices, delivery notes and other details which may be found in the said accounts to be provided by the Plaintiff, that the particulars sought can be supplied. The Plaintiff has since complied with the defendant's request for particulars. Among the particulars requested of paragraph three (3) of the Plaintiff were the following:-

- 1. nature, value and dates of payments made by the defendant to the Plaintiff**
- 2. how the balance of Kshs.10,681,571/73 is arrived at.**

With the information which the Plaintiff has supplied, the defendant should be able to say how much money it has paid to the Plaintiff and the excess payment made, because the details that it considered lacking must have been provided in compliance with the defendant's request for the particulars of paragraph 3 of the Plaintiff. In any case, the defendant must know how much money it has paid to the

Plaintiff, when and if such payment was in cash or by cheque. The defendant shall therefore supply the details sought of paragraph 13 (thirteen) of the counter-claim.

The particulars, which I have in this ruling, ordered the defendant to supply shall be supplied within 21 (twenty one) days from the date hereof. As each party filed an application for the supply of particulars which applications have been successful, I order that each party shall bear its own costs of their respective applications.

Delivered at Nairobi this 14th day of May, 2003.

S. C. ONDEYO

JUDGE

14.5.2003