



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL SUIT NO. 3407 OF 1992

KENYA NATIONAL TRADING CORPORATION LIMITED..... PLAINTIFF

VERSUS

JOSEPH KIMOTHO AND CATHERINE

WACEKE KIMOTHO t/a KIMOFA AGENCIES DEFENDANTS

J U D G E M E N T

The plaintiff, Kenya National Trading Corporation, sued the two defendants John Joseph Ngugi Kimotho, and Catherine Waceke Kimotho, trading as Kimofa Agencies, jointly and severally, seeking a total sum of Kshs.429,014.60, costs of the suit and interest thereon.

The cause of action arose from the value of five cheques (amounting to Kshs.429,014.60) which the defendants issued to the plaintiff, but which upon presentation to the bank were returned with the comments "Refer to Drawer". The details of such cheques – i.e. the cheque numbers, the amounts and dates of issue were all given in para 3 of the plaint.

The plaintiff had an alternative prayer in paragraph 4 of the plaint. It reads,

“Alternatively the plaintiff’s claim against the defendants is for the sum of Kshs.429,014.60 being in respect of the agreed reasonable price of goods sold and delivered by the plaintiff to the defendants, full particulars of which are well within the defendant’s knowledge”.

There is an application for summary judgement on the court file. There is no evidence to show that it was even heard and determined.

Joseph Githu Waweru gave evidence for the plaintiff company and confirmed that the customer, Kimofa Agencies placed orders for the supply of cement from East African Portland Cement through KNTC, the plaintiff. The supply was to be from factory to customer direct. KNTC acted as an agent of E.A Portland Cement. It collected orders from customers and earned a commission.

The witness said that according to the records cement was supplied to the defendant after the order had been placed by the defendant through KNTC, the agent. The defendant was to pay by cheque, and indeed it did pay by cheques which bounced. He gave the numbers of the 5 cheques which the defendant issued, and were dishonored upon presentation to the bank. He confirmed that deliveries of cement in respect of the 5 cheques was made.

The defendant John Joseph Ngugi Kimotho used to run the business Kimofa Agencies together with his wife. He was appointed agent of KNTC.

He identified the 5 cheques he issued to KNTC and said that no deliveries were made against the 5 cheques. That he issued the cheques in November 1981, but the same were banked in January, February 1982, by which time he was no longer in business.

The two learned counsel filed submissions which I have read and considered.

The defendant's submissions are to the effect that the plaintiff did not produce any

“evidence of any delivery made to the defendant which would form the basis of demanding payment for the issued cheques. The plaintiff having failed to prove delivery of the cement which was the basis of the claim, cannot claim payment of the same”.

This submission led me to the defence filed by the defendant, once more. The issue raised in the submissions, the issue of “failure to prove delivery” does not appear in the defence.

If anything, in the defence, the defendant ***“admits having purchased the goods from the plaintiff, but denies that such claimed is actually due or owing and puts the plaintiff to strict proof thereof***”

Another new point which does not appear in the defence is the one which came from the defendant's oral evidence in court, that is, that the plaintiff deposited the cheques in the defendant's bank account about 2 months after the defendant had issued them, and by that time the defendant had closed the business, that is why the cheques bounced. T

he defendant has to stick to his pleadings. He cannot keep raising new points as and when he feels like it. This prejudices his opponent the plaintiff who cannot reply sufficiently because first the pleadings are closed and secondly, the plaintiff feels ambushed because it has had no time to prepare for the “surprise”, points being raised.

Be that as it may, I have read through the two affidavits filed by Lucy Wanjiku Wanjohi, the company secretary of the plaintiff company. These were affidavits filed in respect of the application for summary judgement. They form part of the pleadings in this case.

In the further affidavit dated 18th July, 1997, Lucy said the following in para 5,

“That in the instant case, the East African Portland Cement company Limited delivery notes indicate that the deliveries were received by the defendant as per the defendant's instructions on the plaintiff's Local Purchase Orders, which were prepared in the presence of the defendant or his authorized agent of the post dated cheques and a copy of the Local Purchase Order given to the defendant”.

I find this to be the evidence to show that the defendant received the delivery. The evidence was not rebutted. It must be the delivery the defendant was paying for by the 5 cheques he issued which cheques were marked “Refer to Drawer” when presented for payment.

From the evidence I have analysed above, I find that the plaintiff has proved on a balance of probabilities that he delivered goods to the defendant, who made payment for the same by issuing 5 cheques which bounced when presented to the bank for payment. For the defendant to say that the cheques bounced because they were presented to the bank a month or two after being issued, is an afterthought, as it is a matter not even pleaded in the defence.

I do not find any valid defence to the plaintiff's suit. I heard the suit in full and I now proceed to enter judgement for the plaintiff against the defendant in the sum of Kshs.492,014.60 plus costs and interest.

Dated at Nairobi this 14th day of February, 2002.

JOYCE ALUOCH

HIGH COURT JUDGE