



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 36 OF 1996

L.K. INTERNATIONAL (K) LTD.
.....APPELLANT

VERSUS

KENYA NATIONAL TRADING CORPORATION (KNTC) LTD.
.....RESPONDENT

JUDGEMENT

This suit relates to a dispute over the failure by the defendant to honour an agreement to supply an amount of sugar to the plaintiff after purchase. The suit filed in this court in this respect on 8th January 1996 claimed general damages for breach of contract and conversion of property, special damages in the sum of Kshs.20,147,473/50 and costs of the suit. The case was placed before this court for hearing on 30th January 2001, 22nd November 2001, 24th January 2002, 28th February 2002 and 7th May, 2002 when parties testified and submissions were made by their counsel.

The plaintiff was represented in court by one Jaffer Shariff Omar while the defendant was represented by Erastus Mathews Simali Mukhebi.

Jaffer is the majority share holder in and the Managing Director of the plaintiff. He told the court that during 1995 the plaintiff entered into an agreement with the defendant to buy some sugar from the latter to the tune of 14,000 tons worth Kshs.280 million.

That after the plaintiff bought sugar worth Kshs.110 million, the price went up and the defendant decided to sell the sugar to a third party or third parties.

This action on the part of the defendant forced the plaintiff to file a case in Mombasa court, HCCC No. 404 of 1995 to try and stop the intended sale as the agreement between the two was still in force.

According to this witness, the case ended in a consent which was marked in this case as exhibit 1. That the consent order dated 3.10.95 contained a proposal that the defendant do release the balance of the sugar in the initial agreement amounting to 5000 tons – or 100,000 bags upon payment of the purchase price. This order was based on an agreement entered into by the parties and dated 16th September, 1995. That consequent upon the agreement and the consent order, the defendant released 5800 out of the required 17391 bags and stopped further releases.

According to the witness, he had taken a guarantee with Trust Bank for delivery of the 17391 bags and that payment for the sugar was not due yet since full delivery thereof had not been completed. According to the witness, the mode of payment for the sugar was not cash or bankers cheque but through the bank guarantee. That on the strength of the agreement with the defendant the plaintiff had made an agreement

with a company in Somalia to supply the sugar to them which it was unable to do.

That the plaintiff would have made a profit of Ksh.20,147,473/= if it had received full consignment and that because a full consignment was not delivered, the plaintiff filed this suit.

In cross examination the witness was asked if the plaintiff issued a bankers cheque to the defendant for Kshs. 20 million but he denied this.

The witness accepted that the plaintiff had collected 5800 bags of sugar from the defendant for which it had not paid the requisite price. Mukhebi for the defendant testified that he works as an internal auditor and knew that the plaintiff used to buy sugar from the defendant.

He was also aware of the civil case number 404 of 1995 (Mombasa) and produced the defendant's bundle of documents which included a number of correspondence and other documents relating to this dispute. There was this consent in Mombasa HCCC No. 404 of 1995 of 18th September, 1995 and a letter of the same day giving the plaintiff 10 days to pay for the remaining sugar failing which the defendant would take further action.

But the defendant never did this. Instead it went to Trust Bank to get a bank guarantee undertaking the payment of the purchase price of 17391 bags of sugar upon production of delivery notes duly signed by the plaintiff. It is dated 26th September 1995. But in a reply to this letter, dated 27th September, 1995, the defendant stated that a bank guarantee was not sufficient or adequate to it.

There was then a letter dated 23rd October, 1995 in which the defendant gave the plaintiff 10 days to collect delivery of the sugar upon payment therefor. That the payment was to be effected within the week of the letter but this does not seem to have happened inspite delivery of sugar having been effected as evidenced by the various delivery notes (documents 11 – 16 in the bundle).

There is then a letter dated 27th October 1995 by the defendant to the plaintiff by which the latter stopped any further deliveries of sugar until payment is made on 30th October 1995.

Though the plaintiff were able to raise the required amount by 31st October 1995, the defendant appear to have resold the sugar to third parties. A dispute then arose with each party accusing the other of breach of contract and this is why this suit was filed by the plaintiff. I have heard and recorded almost verbatim the evidence of the witnesses who testified. When the parties entered a consent order in Mombasa High Court Civil Case No. 404 of 1995 the copy the plaintiff's witness produced had this in paragraph 2 thereof:-

(2) That the balance of the 5000 metric tons of sugar in issue to be released to the plaintiff upon payment of its value”.

I think the language was simple here; that the payment was to be made for the sugar before collection. This is what “upon payment of its value” meant.

The plaintiff did not understand it this way. Instead it went to Trust Bank on 26.9.95 and obtained an undertaking from it to pay for the sugar on production of delivery notes covering the consignment duly signed by the plaintiff.

There is no evidence that after the consent orders parties met or exchanged correspondence to agree that an undertaking to pay from the bank would suffice. This is why the defendant wrote back on 27th September, 1997 to say that a Banker's guarantee was not adequate for it. In any case, even during cross examination the plaintiff witness admitted that the agreement was for payment for the value of the sugar before the defendant could release it to the plaintiff and that this agreement did not refer to a bank guarantee.

Though the plaintiff's witness denied even issuing a cheque to the defendant for Kshs.20 million which could have culminated in the issuance of a receipt document 8 in the defendants bundle of documents and

a bank pay in slip – document 9 of the said bundle, he however, during cross examination admitted issuing such cheque which he said he stopped but changed to say this cheque was not in respect of this transaction, without identifying which transaction the cheque related to.

The plaintiff's witness also admitted the plaintiff had collected 5800 bags of sugar from the defendant for which it had not paid for.

From my perusal and consideration of the evidence there is nothing to show or confirm that the defendant was pinned to expecting payment of its sugar by bank guarantee or after all the sugar had been delivered.

This was a business transaction and there was nothing wrong with the defendant revealing to the plaintiff it had other financial obligations dependent on the plaintiff for the sugar collected and the said defendant should not be blamed for demanding payment for its sugar for this reason. Also business transactions depend on trust between the parties and the fact that the property in the sugar passed to the plaintiff by virtue of the latter taking control of the warehouse the sugar was stored and paying storage charges thereof, if at all, does not give the plaintiff any justification for not paying for 5,800 bags of sugar collected from the defendant.

The main issue in case is who of the plaintiff and the defendant breached the agreement entered into by and between the parties?

The consent order in Mombasa High Court Civil Case No. 404 of 1995 gave the terms of this transaction, namely for the plaintiff to collect the sugar from the defendant on payment of the purchase price thereof. It was dated 3rd October, 1995, though parties had signed consent letter on either 16th or 18th September, 1995.

After the signing of the letter the defendant wrote to the plaintiff on 18th September, 1995 giving the latter 10 days to pay for the sugar either by cash or bankers cheque.

The plaintiff did not pay as required but went and arranged for a bank guarantee on 26th September, 1995 which was rejected by the defendant in its letter dated 27th September, 1995.

Then the plaintiff appears to have issued a cheque for Kshs.20 million to the defendant on 23rd October, 1995 and delivery of the balance of the sugar commenced on the same day. The plaintiff was given 10 days to collect the sugar on payment thereof.

This is the letter which must have prompted some money to be paid by cheque.

It would then appear the defendant accepted these proposals and this is how 5,800 bags of sugar were delivered. The proposals included payment for the sugar on delivery.

The witness for the plaintiff admitted stopping the cheque during cross examination and this is why no further deliveries were made.

Given these set of circumstances, I believe it is the plaintiff who breached the contract and cannot turn back to blame the defendant for this purporting that the latter should have delivered the whole sugar before the Trust Bank honoured the guarantee without adducing evidence to show the agreement on the bank guarantee.

There is nowhere in the evidence to show that when the defendant suggested the 10 days time limit for the payment and collection of sugar the plaintiff rejected this and/or proposed the guarantee mode of payment which the defendant accepted.

In fact it appears when parties negotiated an out of court settlement they agreed as to time being of the essence and this was mentioned in the letter by the defendant to the plaintiff dated 6th October, 1995.

The plaintiff did not contest this and having been given 10 days to pay for and collect the balance of the sugar and apparently failing to comply by 27th October, 1995 it unconvincing for them to complain when given up to 30th October, 1995 to pay for the sugar remembering in particular that the plaintiff had issued a cheque on 23.10.95 which had been stopped.

In my view the plaintiff neglected or refused to honour their part of the agreement by failing to make payment for the 5,800 bags of sugar delivered.

In the circumstances, the plaintiff cannot complain for suffering any general or special damages as they are themselves to blame for the collapse of the agreement. I would dismiss their suit with costs.

On the other hand, there is no dispute that the plaintiff accessed and collected 5,800 bags of sugar for which no payment was made to the defendant.

Though there was an attempt to deny this in the reply to defence and counterclaim, the plaintiff's witness did not support this denial in the evidence.

The defendant estimated the price of the collected sugar at Kshs.8,404,280/= and there was no contest over this.

I would therefore award the defendant the amount sought in the counterclaim, Kshs.8,404,280/= with costs thereof and interest at court rate from the date of the counterclaim.

Delivered this 18th day of June, 2002.

D.K.S AGANYANYA

JUDGE