REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO 717 OF 1990

HUSSEIN T/A MN TRANSPORTERS.....PLAINTIFF

VERSUS

AGRO-CHEMICAL & FOOD COMPANY LTD.....DEFENDANT

JUDGMENT

The plaintiff is a transporter. He sued the defendant company on 8.6.99 claiming that he was contracted to transport the defendant's goods between Muhoroni and Mombasa as per their agreement with *inter alia* allowed either side to terminate the contract by giving a 6-month written notice. That on 23.7.98 the defendant terminated the contract contrary to their agreement and so caused the plaintiff to suffer damages.

On 26.8.99 the company filed a defence and counterclaim denying that as at the material time 23.7.98, there was a contract in place binding the parties. That there was a contract sent to the plaintiff to sign but he declined. Thus as it were, left the two litigants without a contract. Any loss or damage to the plaintiff was denied.

The defendant put up a counterclaim for sh 3,414,684/70 made up of what it called true 0.2% agreed rate of loss of its goods while on transit, chargeable on the plaintiff and the penal interest on duty – sh 3,124,651/ 20 and sh 3,026,340/60. That recoveries of shs 3,835,808/40 were made of the total sum.

That between August 1991 and January 1995 such loss during transportation was incurred and further that a sum of sh 3,026,340/60 accrued by way of penal interest due to the Customs Department and which the plaintiff was to pay.

That on 7.11.95 the plaintiff signed up acknowledging the debt of shs 3,124,651/20 and on 22.4.97 he at last owned up to owing and therefore liable to pay the customs duty of sh 3,026,340/60. That however the plaintiff did not pay up what remained after deposits/recoveries – namely sh 3,414,464.20/=.

On 10.9.99 a reply to the defence and defence to the counterclaim was filed. In essence the plaintiff denied generally what the defendant averred. Eight (8) issues were filed by the plaintiff on 31.8.2002 and the trial opened on 25.9.2002.

The plaintiff (PW1) said that he had been transporting molasses and spirit alcohol for the defendant between agreement destinations. This started with an agreement of 27.9.93 wherein the rates were 50 cents per litre per kilometer but this went up to sh 3/= (see (Exh P1) – a bundle. It allowed for 6 months notice to terminate. It looks like the agreement was renewed under the same terms until 27.9.97. At this time the defendant reviewed the transport costs rates downwards to sh 2/75 but the plaintiff did not accept this rate. So he declined to sign the new contract. Apparently even with the dispute on the new rate and

the contract not having been renewed the plaintiff still did some transporting for the defendant quite likely with fewer lorries than before and not–so–regular payments.

So on 30.7.98 the defendants served a letter on the plaintiff terminating the contract (or was it a trading arrangement). (See Exh P1-11). This was answered by the plaintiff's letter of 11.11.98 asking for 6 months notice to terminate (Exh P1-13) and saying that he had lost shs 11.5m.

That on 6.11.95 he signed a memorandum of agreement with the defendant regarding the loss of products during transportation. This PW1 attributed to pressure put on him by the defendant who had withheld his payments for 2 months. There is nothing, though, of this agreement being signed under duress or undue pressure to accept to pay sh 3.1m. By some arrangement he paid it all. That PW1 declined to pay sums due on customs duty.

In cross-examination, the court heard that the parties met and signed the memorandum of agreement (Exh P1-9) but that all the time the plaintiff was not in agreement that liability fell under him. He said the same of the interest or whatever it was charged by the customs department, yet he signed it.

The case of the defendant was based on the evidence of Peter Thuku (DW1), a financial accountant. He knew the plaintiff and was conversant with this case. He also went over the trading relationship with the plaintiff and referred to documents in a bundle (Exh D1) some of which were similar to those the plaintiff produced. That the initial contract of 1993 (Exh P1-15) on whose lines subsequent renewals were made by letters, Clause 3 put on the plaintiff's shoulders 0.2% loss while transporting. Losses occurred up to 31,372 litres and the plaintiff was notified. This gave the monetary value of sh 3,174,654/=. Interest on customs duty on the same came to sh 3,026,340/60. PW1 was notified. DW1 went over the sums that made up their claim in the counterclaim including recoveries that were received from the plaintiff. For both sums' liability, two agreements were signed by both litigants (Ex D1-12, 19). That the plaintiff declined to sign for renewal of the contract after 27.9.97 which he received (Exh D-24). That on 30.7.98 the defendant gave a 2 months notice (Exh D1-20) to terminate what would have been a contract. That there had been none in force since the plaintiff declined the further renewal. That had there been any on the lines of the previous terms, a 6–month notice would have issued.

In cross-examination the court heard that the agreement reviewing the rate of transport would have incorporated costs increase to the transporter. That the agreement that the plaintiff refused to sign had reduced that rate – of which he had been notified in advance due to economic performance. DW1 did not agree that the defendant armtwisted the plaintiff with reduced rates and withholding payments for 2 months, and therefore getting him to sign the agreements on loss during transportation plus penalty on duty. DW1 did not agree that the defendant owed the plaintiff money. The court is not sure which and how much because none was pleaded. The trial closed. Both sides submitted.

The plaintiff's side maintained that the defendant introduced reduced rates of transportation, it forced the plaintiff not to sign a new agreement and that the defendant gave a notice of two months to terminate while this must have been 6 months. That the sums put on the plaintiff to pay were a further point of contention. That even after September 1997, the plaintiff continued to transport the defendant's goods and on the same terms as in the past. The case of *Bilquis Cinema Ltd vs Monteiro* [1967] EA 145 was cited.

The defendant did not agree with the plaintiff. It maintained that a contractual relationship with the plaintiff ceased when he declined to sign up and renew their contract. That thus none was in force and none was breached.

That the sum of sh 11,747,600/= claimed as loss by the plaintiff was a special damage that was not specifically pleaded nor proved and on this account the case of *Charles Sande vs Kenya Corperative Creameries Ltd* Civil Appeal No 154/92 (C.A) and *David Bagine vs Martin Bund* Civil Appeal No 283/96 (C.A)

Of the couterclaim the defendant submitted that it was predicated on signed agreements acknowledging liability followed by part-payment. Reference was made eg to the agreement signed on 7.11.95 followed

by that of 25.4.97. The case of *Johnson Kinyanjui & Anr vs Rachel Thande & Ors* Civil Appeal No 284/97 C.A was cited.

Having heard both sides this court is not in doubt that when the two litigants started trading together, they had written agreements which were renewed. When the last one expired somewhere in September 1997 the plaintiff declined to sign the following one because of the reduced rates of transportation. Under the agreement there was a term of 6 months notice in the event of one party wished to terminate.

The court was of the view also that even when the new contract was not signed by the plaintiff he did some transportation for the defendant until the latter gave 2 months to terminate the relationship on 30.7.98 wef 1.7.98. (Exh P1-11). In this court's view when the plaintiff declined to renew the contract after the previous one expired on 27.9.97, there was nothing more between the parties binding them eg on the 6 months notice to terminate. Without a contract in force one cannot claim to put in place any clause in it. It cannot be assumed that the terms that applied when a contractual relationship existed do continue in force even when there is no contract in force. The nature of the subsequent relationship may be inferred from the conduct of the parties and here it looks like the plaintiff was operating on a month to month basis because his payments were made that way. The court is therefore unable to find that the plaintiff was entitled to 6 months notice to terminate a contract which contract he had declined to sign. The case of *Bilquis* (above) hardly applies here. There it was held *inter alia* that:

> "(i) there was complete unanimity between the parties that the terms of the service agreement continued to apply to the new contract created by the oral agreement on January 17, 1960..."

and so

> (iii) the new contract was subject to the same terms and conditions as formerly applied."

As seen from the circumstances of this case the same is not so here.

Following this, it can only be said that it was gratuitious of the defendant to give 2 months notice to terminate whatever trading relationship it had with the plaintiff after failure to have a renewed contract in place as at 30.7.98.

There having been no contract to breach and so none was breached, the plaintiff is not entitled to general damages. The quantified sum of sh 11,757,600/= does not arise either. If it represented general damages the plaintiff was not entitled to quantify it. The court would have. If it was special damages the sum was not specifically pleaded and proved by evidence. In sum the plaintiff's suit is dismissed with costs.

As for the counterclaim, it is allowed with costs and at court rates because it is rooted in two agreements that the plaintiff signed with the defendant and he even made some payments of it. Those two (of 7.11.95 and 25.4.97) were freely and voluntarily signed by the plaintiff. He made to give evidence that he was armtwisted into signing them. But as observed above the plaint has no pleading with particulars of duress or such other aspect that can vitiate a contract/agreement of this nature.

In the end the suit is dismissed with costs while the counterclaim succeeds with costs.

Judgment accordingly.

Dated and delivered at Nairobi this 22nd day of October, 2002

J.W MWERA

JUDGE