



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI(MILIMANI LAW COURTS)

CIVIL CASE 713 OF 1999

FUELEX KENYA LIMITEDPLAINTIFF

VERSUS

SEED GROUP LIMITEDDEFENDANT

JUDGMENT

The plaintiff, Fuelex Kenya Limited is a limited liability company incorporated in Kenya. It deals in petroleum products.

On 8.6.1999, it instituted this suit for the recovery of the sum of U.S. dollars 399,572.44 which, it claims is owed to it by the defendant, Seed Group Limited, in respect of petroleum products sold and delivered to the defendant pursuant to an agreement between the two parties during the period commencing on 18.11.1997 and ending on 17.4.1998.

It is averred in the plaint that the agreement between the plaintiff and the defendant was partly oral, arrived at during meeting between the plaintiff's Operations and Marketing Manager, Mr. Peter Nduru and the defendant's Finance Director, Mr. Stanley Omoyo Omosa and partly in writing as contained in several documents, details of which are given in the plaint. The plaint also avers that the agreement between the parties is to be inferred from conduct, particulars of which are provided. In a similar manner, the quantities of the petroleum products allegedly delivered as well as the unit price of each delivery is specified in the plaint.

According to the plaintiff, out of deliveries valued at U.S. Dollars 899,572.44, the defendant paid U.S. Dollars 500,000 leaving an outstanding balance of U.S. Dollars 399,572.44 which is the subject of this claim. And finally in paragraph 6 of the plaint, the plaintiff avers that, the defendant issued two separate cheques to the plaintiff in the sums of US Dollars 150,000 and 30,000 drawn respectively on the National Bank of Kenya and Commercial Bank of Africa both of which on presentation were returned unpaid with the remarks "refer to drawer" appended on each.

In its defence, the defendant admits having entered into an agreement pursuant to which the plaintiff agreed to sell to the defendant who in turn agreed to purchase petroleum products. The defendant however avers that the sale agreement between it and the plaintiff was and is "illegal and unenforceable and made in breach of public policy". For those reasons, the defendant contends that the suit is incompetent and bad in law. The defendant also denies that it was obliged by the agreement to pay for the petroleum products upon delivery or upon submission of invoices and contends that it was a condition

precedent to the payment for the products sold to it by the plaintiff that the defendant would have sold the same to Burundi and received payments thereof.

The defendant further avers that prior to entering into the agreement with the plaintiff, the defendant had made it clear (to the plaintiff) that the products were purchased for export to Burundi and since the plaintiff on its part was experiencing problems with the marketing of its products to Burundi due to the embargo imposed by the Government of Kenya, it agreed to let the Defendant have the products and to pay for them after receipt of payment for the same from its customers in Burundi. The defendant laments that due to exchange control difficulties imposed by the Government of Burundi, the defendant has not received any payment and is still pursuing the issue. For those reasons, the defendant claims that payment to the plaintiff is not due and the suit is premature.

The defendant also contends that the price for the petroleum products was not agreed and cannot be implied from the defendant's failure to challenge it within a reasonable time after receipt of the pro-forma invoices.

And lastly although the defendant admits that the two cheques referred to in the plaint were dishonoured, it implies that it is not liable. The defendant does not suggest that the dishonoured cheques have been replaced or in any other way satisfied.

The two parties were apparently unable to agree on the issues arising from their respective pleadings and, in the circumstances, each filed its own issues. Considering that in its defence the defendant admitted that the agreement averred in the plaint pursuant to which agreement the plaintiff agreed to sell to the defendant who also agreed to purchase "petroleum products" without specifically denying the specific quantities stated in paragraph 3 of the plaint, save the prices shown therein, the defendant is, by virtue of O. VI rule 9 (3) of the Civil Procedure Rules deemed to have admitted not only the agreement but also delivery of the quantities stated in the plaint. Given that position, it is clear that the issues stated by the plaintiff's learned counsel as numbers 1 to 10 are not quite correct because given the admission aforesaid, it is not an issue whether or not the defendant agreed to buy the products or indeed whether the products were supplied or delivery was taken. All that is admitted. What is not admitted as will be clear from a careful reading of paragraphs 6 and 7 of the defence is the price of the products. As to this issue, I shall revert later in this judgment. For the same reasons as are stated above, all the evidence tendered by the defendant's only witness suggesting that there was no contract of sale between the plaintiff and the defendant and that the defendant was simply facilitating the transportation of petroleum products to Burundi on behalf of the plaintiff not only contradicts the defence put forward by the defendant but is also irrelevant to the issues before the court. I say so because having admitted in paragraph 1 of the defence that both the plaintiff and the defendant entered into an agreement by virtue of which the defendant agreed to purchase petroleum products from the plaintiff and that such petroleum products were sold and delivered, I do not see the purpose of wasting so much time and effort in trying to show that the defendant was the facilitator of the transportation of the products on behalf of the plaintiff and not their own. In my judgment, having admitted the purchase and the taking of possession of the products, the issue of ownership cannot properly be raised.

If we remove the issue of the agreement to purchase the petroleum products as well as the supply, delivery and the quantities of the products involved, which, as aforesaid, are not real issues in this matter, then we are left with the question of the price of the products that were the subject of the contract. This means that apart from the issue of price, items numbers 1 to 10 of the issues listed by the plaintiff's advocates are clearly otiose. That view of the matter is in fact shared by the defendant's learned advocates for, in their statement of issues, they clearly recognise that the question of an agreement or supply of the petroleum products to be a non-issue. To them, the live issue is whether the agreement between the parties is enforceable and also whether the defendant is liable to pay and if so for what petroleum products. Even the allegations made regarding the cheques are not specifically traversed.

For the reasons stated above, I think the plaintiff's claim against the defendant can best be considered on the basis of the issues raised by the defendant's advocates. The first of those issues is whether the agreement between the plaintiff and the defendant is legally enforceable. The defendant claims that the

contract or rather agreement between the parties is not enforceable while the plaintiff claims that it is enforceable.

The basis of the defendant's claim that the contract between the plaintiff and the defendant was unenforceable is on account of illegality. In that respect, it is contended that the contract was made in breach of public policy and accordingly the suit based thereon is incompetent and bad in law. That contention is based on the claim that the agreement between the parties was, with the full knowledge of both parties, intended for the purchase and export to the Republic of Burundi Petroleum Products in breach of an embargo imposed by the Government of Kenya against trade with the Republic of Burundi. The defendant claims that the agreement was intended to evade the embargo. Section 107 (1) of the Evidence Act provides:-

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist”.

It is the defendant who asserts that there was an embargo imposed on all exports to the Republic of Burundi by the Government of Kenya. It must therefore prove the existence of the embargo. What is the evidence of that embargo?

Sovereign countries impose and enforce trade and other sanctions through legal instruments. As regards the alleged embargo, the evidence for that from the defendant's side is very thin. It was tendered by the defendant's Finance Director Mr. Stanley Omoyo Omosa whom I must say I found quite unreliable. Firstly, he said that he did not enter into an agreement with the plaintiff which contradicted the defendant's own defence which in the first paragraph states:-

“The plaintiff and the defendant entered into an agreement pursuant to which the plaintiff agreed to sell to the defendant who agreed to purchase petroleum products”.

Flowing from what I have stated above, it is also patently clear that the story of the contract having been entered into in order to evade the embargo on Burundi is DW1's own invention. If the government of Kenya intends to impose an embargo as aforesaid, it would do so through some legal notice.

It cannot do so through newspaper announcements or verbal pronouncements. The fact that the defendant did not produce any legal instrument to substantiate its claim goes far to show that DW1's evidence lacks substance.

And in any event, the evidence relating to the alleged embargo is not all that clear. An embargo is by definition a governmental order prohibiting commercial trade with individuals or business of other specified nationals.

The only evidence about the embargo was DW1's bare statement that an embargo had been placed on Burundi by all the East African countries under which all trading of every description was prohibited. The witness did not tender any legal notice or other document to support his claims and I do not consider what he said to be sufficient proof of the existence of the alleged embargo. I note, in this respect, that together with his submissions, Mr. Fred Ojiambo for the defendant, has attempted to introduce some additional material by annexing to his submission some documents relating to the alleged embargo which said documents were not referred to by any witness during the trial of this matter. Given that fact, what Mr. Ojiambo did was to introduce new evidence through submissions, a practice that is irregular. The said documents are therefore improperly before the court and cannot be taken into consideration in this matter. That leaves only DW1's word in support of the claim by the defendant of the existence of an embargo, which as observed above is insufficient. Accordingly, I reject the defendant's claim that there was an embargo in force against Burundi as at the time of the contract leading to this suit.

The plaintiff's evidence as tendered by PW1 was that some time in 1997, DW1 requested him to sell oil products to the defendant for export to the defendant's customers in Rwanda. After negotiations between the parties leading to agreement on price and quantities, the first item that was sold was Jet A-I. The

procedure followed in completing the sale transaction of this item, which was followed in all the other 4 transactions, was that the plaintiff send to the defendant a pro-forma invoice No. 0202T (Exh. 1) showing the product (JETA-1), the quantity (1000m3), the unit price (US Dollars 227.00 per m2 FOT Eldoret or Kisumu), delivery (self collection in own motor vehicle from Eldoret/Kisumu KPC Terminals), amount due on the transaction (US Dollars 227,000) manner of payment including the bank and the account.

Upon receipt of exh. 1, the defendant sent by fax to the plaintiff (for the attention of PW1) instructions to load the product to several trucks whose registration numbers are specified in the document. Pursuant to those instructions, some 973,000 litres of Jet A-1 were loaded at the Kisumu Depot of the Kenya Pipeline Co. into motor vehicles sent there by the defendant.

Two points have been raised by the defendant regarding the transaction. Firstly, it is contested that the price of the products was not agreed and therefore the plaintiff's claim is not sustainable. That argument in my view lacks substance because before sending its trucks for loading, the defendant was already in receipt of the pro forma invoice which, as aforesaid, contained amongst other things, the price per unit being charged for the product. If the defendant did not agree with the price quoted in the pro forma invoice, it should have communicated its disagreement to the plaintiff before collecting the product. By collecting the product without raising any query regarding the contents of the pro forma invoice, the defendant is deemed to have accepted all the terms contained in the pro forma invoice including the price. Accordingly, while I agree with Mr. Ojiambo's submissions that a pro-forma invoice is a provisional invoice, I cannot accept his further argument that unless he performs strictly in accordance with the terms of the pro-forma invoice, the buyer cannot be taken to have necessarily accepted the terms thereof. In my view, a proforma invoice contains the seller's terms of a proposed transaction. The buyer is free to accept or reject it. He is not however free to have it both ways. And he certainly cannot be allowed to keep quiet about the terms in the pro-forma invoice, collect the goods and when called upon to pay, complain that the price was not agreed. Quite clearly, the defendant is in this matter trying to have its cake and at the same time eat it. It cannot be permitted to do so.

The other point raised by the defendant regarding the transaction concerns the description of the plaintiff in the Customs and Excise Department's Excise Department's Ex-Warehouse Export Entry Form (C21) in which the plaintiff is shown as the exporter. In his submissions, Mr. Ojiambo said that the description of the plaintiff as the exporter demonstrates that there never was an intention by the plaintiff to sell the oil products to the defendant. That contention is however untenable because, apart from going against the grain of the admission by the defendant that there indeed was a sale agreement and the oil products were in fact supplied to as agreed, it ignores PW's explanation regarding the matter that as the owner of the goods in the bonded warehouse, customs regulations require that the plaintiff be shown as the owner of the goods in Form C. 21. Consequently, all the talk by the defendant's learned counsel about the plaintiff having knowingly made false and incorrect entry and of allegedly breaking the law is based on a false foundation.

In the end, I find that the transaction commenced by the issuance of the pro-forma invoice No. 0202J and supported by subsequent loading instructions and the relevant Ex-warehouse Export Forms clearly establishes a valid contract for the supply of petroleum products at an agreed price of U.S. Dollars 973,000. The other 4 subsequent pro-forma invoices starting with No. 0250T for the supply of Premium Motor Sport and Automatic Gas oil valued at U.S. Dollars 91,535, No. 0279T for Kerosene with U.S. Dollars 76,626 and lastly No. 0288T for PMs valued at 75,221 U.S. Dollars were all made under similar circumstances as pro-forma invoice No. 0202T and the transactions in relation thereto are supported by similar evidence.

Accordingly, I find them proved and therefore enforceable.

The total sum payable pursuant to the five transactions is U.S. Dollars 899,572.43. There is ample evidence that the defendant has paid US. Dollars 500,000 on account. That leaves a balance of U.S. Dollars 399,572.43 still outstanding. That is the amount of the plaintiff's claim. For the above reasons, I find the claim proved on a balance of probability and accordingly, I enter judgment in favour of the plaintiff against the defendant for the said sum of U.S. Dollars 399,572.43 together with costs and interest

at court rates.

Dated at Nairobi this 23rd day of June 2000.

T. MBALUTO

JUDGE