Jilao Company Limited v Fahari Trading Limited & another (Civil Suit 160 of 2015) [2024] KEHC 1455 (KLR) (15 February 2024) (Judgment)

Neutral citation: [2024] KEHC 1455 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL SUIT 160 OF 2015

DKN MAGARE, J

FEBRUARY 15, 2024

BETWEEN

JILAO COMPANY LIMITED ..... PLAINTIFF

AND

FAHARI TRADING LIMITED ..... 1ST DEFENDANT

MAERSK LINE (K) LIMITED ..... 2ND DEFENDANT

JUDGMENT

1. The Plaintiff filed suit on 11/12/2015 claiming the following: -

    a. An order of strict performance of the agreement dated 11/10/2015 mutually entered between the plaintiff and the first defendant for purchase of 30 containers bearing the following bill of lading: -

        i. 567882578

        ii. 567892593

        iii. 768141342

    b. A permanent injunction stopping the 2nd defendant from releasing the containers to the 1st defendant until the suit is determined

    c. General damages

2. The plaintiff filed a notice of motion dated 11/12/2015 with a similar one filed by the 1st defendant. This resulted in the ruling by justice PJ O Otieno given on 22/12/2015. The net result was that the rice was released to the Plaintiff. Subsequently, the defendant filed defence and counterclaim on 8/2/2021 claiming the following orders: -

3. The defendant field a statement dated 15/5/2021. The plaintiff did not produce any documents.

4. The plaintiff, despite being served did not file any reply to defence or defence to counterclaim.

Evidence

5. Only one witness testified, that is DW1 JAWAD ALI. He adopted his statement dated 15/2/2023. He also produced documents dated 24/2/2022 filed on 29/9/2022. On cross-examination, he stated that the subject goods were released on the strength that payment was transferred, which turned out to be false. The witness stated that the defendant was not paid. There was said to be money sent to the Plaintiff's agent, Abdiwelli Dahir Ahmed. The said agent is said to have attempted to transfer the money on 12/10/2015. Unfortunately, Imperial Bank Ltd, their bankers were placed under statutory management. This money never reached the 1st defendant.

6. The agent has not to date transferred the consideration to the Plaintiff. The 1st defendant testified and closed their case. The plaintiff closed their case without calling a witness. I gave directions on the filing of submissions and judgment date.

Burden of proof

7. The Burden of proof is on the party who alleges. The allegations are two in this case;

   a) Rice was supplied

   b) Payment was made

8. It was conceded that rice was released to the plaintiff under a court order. The issue of payment is what is in issue. It is the duty of a person alleging not to be indebted to show that they paid. It is not enough to send money to the plaintiff's agent. It must be shown that the money left the agent's account to the defendant.

9. The amount in dispute was USD 256000 which was to be deposited in the defendant's account No. 7200014537. This amount was to be transferred through the plaintiff's agent Abedwelli Dahir Ahmed. The money having been sent to the agent's account, rice was released.

10. The money was never credited to the account. This was discovered upon the Imperial bank being placed under statutory management. The money was subsequently returned to the plaintiff to the tune of 6,000,000/=. The plaintiff received rice through trickery, cheating and fraud.

11. The 1st defendant claimed for a USD 256000 (Kshs. 27,000,000)

1st Defendant's Submissions

12. The first defendant filed submissions dated 30/10/ 2023. They pray for judgment and reiterate the contents of the counterclaim. They state that the rice was released on basis of fraudulent documents. The money never hit their account. It was their submissions that the imperial bank under receivership never acted on the instructions.

13. Finally, they state that the defendant did not file a reply to the defence and defence to counterclaim.

Plaintiff's submissions

14. The plaintiff did not file submissions as at the time of delivery of this judgment.

Analysis

15. Order 2 rule 10 provides as doth: -

> " Particulars of pleading [Order 2, rule 10.]
>
> (1) Subject to subrule (2), every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing—
>
> (a) particulars of any misrepresentation, fraud, breach of trust, willful default or undue influence on which the party pleading relies; and
>
> (b) where a party pleading alleges any condition of the mind of any person, whether any disorder or disability of mind or any malice, fraudulent intention or other condition of mind except knowledge, particulars of the facts on which the party relies.
>
> (2) The court may order a party to serve on any other party particulars of any claim, defence or other matter stated in his pleading, or a statement of the nature of the case on which he relies, and the order may be made on such terms as the court thinks just. (3) Where a party alleges as a fact that a person had knowledge or notice of some fact, matter or thing, then, without prejudice to the generality of subrule (2), the court may, on such terms as it thinks just, order that party to serve on any other party— (a) where he alleges knowledge, particulars of the facts on which he relies; and (b) where he alleges notice, particulars of the notice. (4) An order under this r. shall not be made before the filing of the defence unless the order is necessary or desirable to enable the defendant to plead or for some other special reason.

16. The 1st defendant pleaded that the plaintiff received 30 containers without payment. This pleading was unrebutted. No defence was filed to it and no evidence was led. The Plaintiff never bothered to file a reply to defence.

17. Without a reply to defence, the specific allegations made in the defence and which were not raised in the plaint remain uncontroverted. Parties must understand that they must first plead their case before proceeding to proof them.

18. The burden on proof is set on whosever will fail if no evidence is tendered by either side.

19. The question as to what amounts to proof on a balance of probabilities was discussed by Kimaru, J in William Kabogo Gitau vs. George Thuo & 2 Others [2010] 1 KLR 526 as follows:

> " In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

20. In Palace Investment Ltd vs. Geoffrey Kariuki Mwenda & Another (2015) eKLR, the judges of Appeal held that:

> " Denning J. in Miller Vs Minister of Pensions (1947) 2 ALL ER 372 discussing the burden of proof had this to say; -
>
> "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where both parties...are equally (un)convincing, the party bearing the burden of proof will loose, because the requisite standard will not have been attained."

21. Pleadings are like palm wine with which cases are eaten. They set boundaries for determination to avoid both the court and the parties from engaging in a wild goose chase. They guide the court on what must be decide and more specifically excludes what is not to be decided. Replying to the defence narrows down points of conflict in a more profound way. By failing to reply to the defence, it is deemed that there was nothing useful that could have been said, given the profound truth in the defence.

22. In the case of Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018] eKLR, justice A C Mrima stated as follows: -

> 11. It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded. That settled position was re-affirmed by the Court of Appeal in the case of Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR which cited with approval the decision of the Supreme Court of Nigeria in Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002 where Adereji, JSC expressed himself thus on the importance and place of pleadings: -
>
> > ".....it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....
> >
> > ...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation."
>
> 12. The Supreme Court of Kenya in its ruling on inter alia scrutiny in the case of Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR found and held as follows in respect to the essence of pleadings in an election petition: -
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> > "In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully

alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings.....'"

23. Both the court and parties cannot wander off the pleadings and speculate on what may or may not have happened. There was no pleadings that any money was paid. If any payment was made it could show on the plaintiff's bank statement. Under section 176 of the Evidence Act a banker's statement is proof of the contents therein. The defendant is under no obligation to prove a negative. It is the plaintiff who alleged payment should produce the bank statement to prove that act. The section provides as doth: -

> " 176. Subject to this Chapter a copy of any entry in a banker's book shall in all legal proceedings be received as prima facie evidence of such entry, and of the matters, transaction and accounts therein recorded."

24. No such evidence was produced. In the case of Shalimar Flowers Self Help Group v Kenya Commercial Bank [2016] eKLR, the court, C W Meoli stated as doth: -

> " The paying banker must pay in good faith and in the ordinary course of business. Hence the burden lies with the plaintiff customer in such case to prove negligence, whereas the collecting banker will aim to show that he acted without negligence. In the Barclays Bank of Kenya case (Supra), the learned Judge (Aburili J) cited a portion of the judgment in Simba Commodities Ltd versus Citibank N.A. Civil Case No. 236 of 2003 (2013) eKLR wherein the case of Karak Brothers Company Ltd versus Burden (1972) ALLER was quoted. The cited passage demonstrates the scope of the duty of a paying banker to its customer and is worth reproducing in extenso:
>
> > "as to the nature and extent of the contractual duty of care owed by a paying bank to its customer when called on to honour a cheque drawn by the customer; and in particular, in the case of a corporate customer which has given the usual mandate to its bank, to what extent the bank is entitled to place exclusive reliance on the fact that the cheque is signed by the corporation's duly authorized signatories the conclusion reached by Ungoed-Thomas J was as follows:
> >
> > '... a bank has a duty under its contract with its customer to exercise "reasonable care and skill" in carrying out its part with regard to operations within its contract with its customer. The standard of that reasonable care and skill is an objective standard applicable to bankers. Whether or not it has been attained in any particular case has to be decided in the light of all the relevant facts, which can vary almost infinitely. The relevant considerations include the prima facie assumption that men are honest, the practice of bankers, the very limited time in which banks have to decide what course to take with regard to a cheque presented for payment without risking liability for delay, and the extent to which an operation is unusual or out of the ordinary course of business. An operation which is reasonably consonant with the normal conduct of business (such as payment by a stock broker into his account of proceeds of sale of his client's shares) of necessity does not suggest that it is out of the ordinary course of business. If "reasonable care and skill" is brought to the consideration of such an operation, it clearly does not call

for any intervention by the bank. What intervention is appropriate in the exercise of reasonable care and skill again depends on circumstances.'

As between the company and the bank, the mandate, in my view, operates within the normal contractual relationships of customer and banker and does not exclude them. These relationships include the normal obligation of using reasonable skill and care; and that duty, on the part of the bank, of using reasonable skill and care, is a duty owed to the other party to the contract, the customer, who in this case is the plaintiff company, and no to the authorized signatories. Moreover, it extends over the whole range of banking business within the contract. So the duty of skill and care applied to interpreting, ascertaining, and acting in accordance with the instructions of a customer; and that must mean his really intended instructions as contrasted with the instructions to act on signatures misused to defeat the customer's real intentions. Of course, omnia praesumuntur rite esseacta, and a bank should normally act in accordance with the mandate – but not if reasonable skill and care indicate a different course." (emphasis supplied).

25. What is the passage above Saying? The bankers have certain duties. These duties are carried wit due case and skill. The first duty is to the customer. In this case the known customer was Adel xxxxxxxxxxxx.

26. They did not, for reasons of their being under statutory management execute the contract to transfer money to the 1st Defendant. Put in another way, is the 1st defendant entitled to a refund of the money in the agent's account? Can the 1st defendant sue for that money? The answer lies in the law of agency.

27. In the case of Mark Otanga Otiende v Dennis Oduor Aduol [2021] eKLR, Justice R.E. ABURILI stated as doth: -

" In its classical adaptation, the doctrine of privity of contract hypothesizes that a contract cannot confer rights or impose obligations on any person other than the parties to the contract. Accordingly, a contract cannot be enforced either by or against a third party, except in certain cases only. In Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd [1915] AC 847, Lord Haldane, LC rendered the principle thus:

"My Lords, in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it."

61. In the Agricultural Finance Corporation v Lengetia Ltd (supra), quoting with approval from Halsbury's Laws of England, 3rd Edition, Volume 8, paragraph 110, Hancox, JA, reiterated that:

> "As a general rule a contract affects only the parties to it, it cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it. The fact that a person who is a stranger to the consideration of a contract stands in such near relationship to the party from whom the consideration proceeds that he may be considered a party to the consideration does not entitle him to sue upon the contract."

62. Over time, some exceptions to the doctrine of privity of contract have been recognized and accepted. Among these exceptions is where a contract between

> two parties is accompanied by a collateral contract between one of them and a third party relating to the same subject matter. In Shanklin Pier V Detel Products Ltd [1951] 2 KB 854, for example, the plaintiff owned a pier, which it wished to be repainted. After the defendant represented to the plaintiff that some particular paint was fit for the purpose, the plaintiff directed its contractor to use that paint. The contractor purchased the paint from the defendant, which proved unfit for the purpose. Upon a suit by the plaintiff against the defendant, the court found for the plaintiff notwithstanding the fact that there was no privity of contract between the plaintiff and the defendant, as far as the contract for the sale of the paint was concerned."

28. It does not matter that all parties knew that the money which Abdiwelli Dahir Ahmed had was for the benefit of the 1st Defendant. There was no actual payment to the 1st Defendant.

29. The letter dated 11/10/2015 sets out the terms of purchase of 30 containers of rice. The amount therein is indicated as USD 271.350/=. The first defendant produced bill of lading Nos: -

    a. 56882578

    b. 567892593

    c. 76814342

30. They also produced 39 tally sheets for release of bags of rice t the Plaintiff. There were various invoices produced. They were for various amounts.

31. The defendant annexed RTGS- Real times gross service for transfer of the consideration to their account and another slip for payment of money to their account by Abdiwelli Dahir Ahmed and an internal transfer for USD 256,000/=. Subsequent to this the 1st Defendant complained through letters dated 26/9/2019 and 8/1/2020 regarding the non- transfer of the consideration. This is cemented by the plaintiff's demand to the bank, requesting for original documents.

32. Their was no reply as to the original documents. These relate to payment. I take it to imply that the plaintiff did not have original documents. I do not understand how, the plaintiff will have supplied copies to the 1st defendant without having received the original documents. It is not normal to leave original documents with the bank. The bank usually keeps their copies and the customer theirs. The demand is a red herring meant to obfuscate issues and confuse the matter. Only one document will have shown movement of money from the account of the plaintiff's agent to the first defendant, a bank statement. I note that the 1st defendant made a positive allegation that a sum of 6,000,000/= was refunded to the plaintiff's agent. There was no rebuttal of this evidence.

33. This court, on 22/12/2015 declined to restrain the release of rice to the third parties who bought the same from the Plaintiff. The court was of the view that the demanded amount is ascertainable. It is thus my finding the rice was supplied to the Plaintiff. Thereafter, for reasons known only to the plaintiff, for which this court cannot but surmise, though not hard to fathom, chose not to testify.

34. By failing to rebut the 1st Defendant's evidence, the plaintiff is deemed to accept the same as true. The 1st defendant's evidence was succinct and unrebutted. Cross examination was on mundane issues that did not touch the matters in issue. In the case of Simeon Nyachae v Eric Ongeri & 2 others [2015] eKLR, the court, Justice Sergon stated as doth: -

7. The first issue I would like to deal with is the consequence of the Defendants' failure to tender any evidence. Makhandia J., discussed the consequence of such failure in Karuru Munyoro v. Joseph Ndumia Murage & Another Nyeri HCCC No. 95 of 1988 where he held as follows: -

> "The plaintiff proved on a balance of probability that she was entitled to the orders sought in the plaint and in the absence of the defendants and or their counsel to cross-examine her on the evidence, the plaintiff's evidence remained unchallenged and uncontroverted. It was thus credible and it is the kind of evidence that a court of law should be able to act upon." (Emphasis mine)

8. In Janet Kaphiphe Ouma & Another v. Marie Stopes International(Kenya) HCCC No. 68 of 2007, Ali-Aroni j, stated:-

> "In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations...Section 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same by way of evidence."

35. This is not a new phenomenon. In the case of Raghbir Singh Chatte v National Bank of Kenya Limited [1996] eKLR, the court of Appeal stated as doth: -

> " The main object of this rule and r.14 is to bring the parties by their pleadings to an issue, and indeed to narrow them down to definite issues, and so diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing (per Jessel M. R. in Thorp v Holdworth (1876) 3 Ch. D. 637). This object is secured by requiring that each party in turn should fully admit or clearly deny every material allegation made against him. Thus, in an action for a debt or liquidated demand in money, a mere denial of the debt is wholly inadmissible", (underling supplied).
>
> I will also add that the crucial deficiency of a general denial which I have already described, also applies to the evasive, inconsistent and contradictory alternative general traverse in the appellant's defence. This was that if the respondent had extended any overdraft facilities without stating the amount involved, to the appellant which was moreover, denied, then the same and here again, without stating how and when, had been paid. Such a spurious pleading in the alternative cannot give any merit to the defence and so also makes it one which discloses no reasonable defence for all purposes including that of 0 6 r 13(1)(a)."

36. In this case no defence was filed to the counterclaim. Without a defence the court cannot presume a defence that could have been used. This is also set out in Order 2 rule 4 of the Civil Procedure Rules, which states as doth: -

> " Matters which must be specifically pleaded
>
> (1) A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant Statute of limitation or any fact showing illegality—,

(a) which he alleges makes any claim or defence of the opposite party not maintainable; (b) which, if not specifically pleaded, might take the opposite party by surprise; or

(c) which raises issues of fact not arising out of the preceding pleading.

37. The plaintiff is singularly in a unique position to settle the imbroglio whether payment was made or not. It is specifically within their special knowledge. There is a negative inference to be made if a party with special knowledge and having documents, such as a bank statement, fails to produce them. Section 112 of the evidence Act ordains as doth: -

> " 112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."

38. In the case of Nesco Services Limited v CM Construction [EA] Limited [2021] eKLR, justice G V Odunga as then he was stated as doth:

> " In my view, the fact that the document in question was authored by the Appellant's agent and was produced by consent of the parties themselves entitled the learned trial magistrate to rely on it. The Court of Appeal in Ephantus Mwangi and Another vs. Duncan Mwangi Civil Appeal No. 77 of 1982 [1982-1988] 1KAR 278 had this to say on the issue:
>
> "Where documents are put in by consent, as for example an agreed bundle of correspondence, the usual agreement is that they are admitted to be what they purport to be (so as to save the necessity for formal proof of each document)."
>
> 41. Since the said author was for reasons unknown to the Court not called to testify and dispute its authenticity, adverse inference could be made thereon. In Kenya Akiba Micro Financing Limited vs. Ezekiel Chebii & 14 others [2012] eKLR the court stated as follows:
>
> "Section 112 of the Evidence Act Chapter 80 of the laws of Kenya provides:
>
> 'In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proofing of disproving that fact is upon him.'
>
> Where a party has custody or is in control of evidence which that party fails or refuses to tender or produce, the court is entitled to make adverse inference that if such evidence was produced, it would be adverse to such a party. In the case of Kimotho –vs- KCB (2003) 1 EA 108 the court held that adverse inference should be drawn upon a party who fails to call evidence in his possession."

39. Notwithstanding that there was no rebuttal, the p1st defendant had a duty to proof their case. The plaintiff equally had a duty to support their case. In the case of Sumer Singh Bachu v Nicholas Wainaina Kago Waweru [1976] eKLR stated that:

> " When the suit was heard ex parte, the plaintiff was under a legal duty to prove his case against both defendants. This he failed to do in respect of the second defendant. In my view, the fact that the proceedings were described or referred to as "formal proof" did not lessen the plaintiff's burden of proof required in a civil case. It was not sufficient to expect the court to act on the allegations in the plaint when the evidence adduced indicated clearly that the second defendant was not connected with the accident. In my judgment, the judge was justified on the material before him to dismiss the suit against the second defendant and also to dismiss the application to review his judgment."

40. The totality of the evidence shows that the attempt to pay USD 256,000/= was aborted. The plaintiff gave the 1st defendant useless papers that were not accompanied by money. This is not a case where payment was made and money frozen. The money was frozen before the payment. The agent has received a refund of Ksh 6,000,000/=. The 1st defendant does not have both rice and the money. Though they had an unpaid seller's lien the lien was defeated by the release of rice to a third party. The 1st defendant was not just left with a short end of the stick, but the plaintiff disappeared with the entire stick.

41. The reasons for non-transfer are not important. There is no defence as to why the 1st Defendant was not paid. It is the duty of a debtor to seek their creditors and pay them. The money in the account remained the property of Abdiwelli Dahir Ahmed. The relationship between the money and the transaction herein is tenuous. The risk in the money did not pass to the 1st Defendant. Any loss due to liquidation therefore fell where it was due. The risk can only pass upon the money being credited to the 1st defendant's account.

42. In Dickson Maina Kibira v David Ngari Makunya [2015] eKLR, the Court, Ngaah Jairus,

> " as noted, the contract between the plaintiff and the defendant wasoral without any evidence of express terms or conditions; their intention as to when property would pass could not outrightly be gathered from their contract. It follows therefore that this aspect of the contract could only be gathered from their conduct and the peculiar circumstances of their case. In this regard section 20 of the Sale of Goods Act is useful because in the absence of any express terms or conditions, it provides the rules for ascertaining the parties' intention as to when property passes.
>
> 20. Rules for ascertaining intention as to time when property passes
>
> Unless a different intention appears, the following rules apply for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer—
>
> (a) where there is an unconditional contract for the sale of specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery or both be postponed;
>
> (b) where there is a contract for the sale of specific goods and the seller is bound to do something to the goods for the purpose of

putting them into a deliverable state, the property does not pass until that thing be done, and the buyer has notice thereof;

(c) where there is a contract for the sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, test or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until that act or thing be done, and the buyer has notice thereof;

(d) when goods are delivered to the buyer on approval or "on sale or return" or other similar terms, the property therein passes to the buyer—

(i) when he signifies his approval or acceptance to the seller or does any other act adopting the transaction;

SUBPARA (ii)

if he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of that time, or, if no time has been fixed, on the expiration of a reasonable time;

(e) (i) where there is a contract for the sale of unascertained or future goods by description, and goods of that description, and in a deliverable state, are unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer; and assent may be express or implied, and may be given either before or after the appropriation is made;

(ii) where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee or custodier (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract.

The contract between the plaintiff and the defendant was not contingent upon anything or subject to the happening of an event; it was unconditional in the sense of section 20(a) of the Act. It can legitimately be concluded, that under that provision the property in goods passed to the plaintiff the moment the contract was concluded."

43. In this case the contract for sale of rice was complete. The payment was not done. the money will only be deemed to have been paid when the receiving bank receives credit. The 1st defendant's account was

never credited. The risk in the money was not transferred to the 1st defendant. In Van Dorn Limited vs East African Breweries Limited [2014] eKLR in which the court stated with approval that:

> "I concur with the submissions of the appellant when it maintained that the provisions of section 20(a) of the Sale of Goods Act (Supra) applied to the contract between the parties. I find that the respondent purchased specific goods from the appellant in a deliverable state and as a result, the property passed to it when the contract was made. As is detailed in Benjamin's Sale of Goods 4th Edition paragraph 6-002: "Risk follows property. 'As a general rule,' said Blackburn J in Martineau v. Kitching, 'res perit domino', the old civil law maxim, is a maxim of our law; and when you can show that the property passed, the risk of the loss prima facie is in the person with whom the property is."

44. The money remained in the account of Abdiwelli Dahir Ahmed. The property in that money never passed to the 1st defendant. Consequently, the risk remained with Abdiwelli Dahir Ahmed or their disclosed principal, the Plaintiff. Without the property in the money passing and with the risk remaining in the Plaintiff, there was no payment. I therefore find and hold that the 1st defendant remains unpaid to date.

45. I also find that a sum of USD 256,000/= Was due and owing. The next question is whether the court is to award in Kenya shillings and or in usd. The contract was in USD. The contracting currency is USD. I Decline the invitation to award in Kenya shillings.

46. On the other hand, though the plaint was substantially spent, it was not formally withdrawn. Though it resulted to the release of rice, it amounted to stealing a match on the 1st defendant. The goods were released without payment. The Plaintiff sold the same and enjoyed profits without bearing the costs. They received Ksh 6,000,000/= as refund of the same money they were alleging belonged to the 1st Defendant. They did not bother to pay the purchase price to date. The plaintiff cannot be allowed to unjustly enrich themselves. I there find and hold that the plaint is not proved. I accordingly dismiss the same with costs of USD 4,250/=.

47. I also find that the counter claim for USD 256,000/= is merited. I therefore allow the same with costs of USD 4,550/=.

Determination

48. In the end, I make the following determination:

    a. I dismiss the plaintiff's case with costs of USD 4,250/=

    b. I allow the counter claim for USD 256,000/= with costs of USD 4,550/=.

    c. Interest on USD 4,550/= from 21/10/2020, the date of filing of the counterclaim.

    d. 30 days of execution.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 15TH DAY OF FEBRUARY, 2024. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

No appearance for parties

Court Assistant - Brian