



Kellogg Company of SA (Pty) Limited v Tropikal Brands (Afrika) Limited (Civil Case 326 of 2017) [2024] KEHC 12859 (KLR) (Commercial and Tax) (18 October 2024) (Judgment)

Neutral citation: [2024] KEHC 12859 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 326 OF 2017
FG MUGAMBI, J
OCTOBER 18, 2024**

BETWEEN

KELLOGG COMPANY OF SA (PTY) LIMITED PLAINTIFF

AND

TROPIKAL BRANDS (AFRIKA) LIMITED DEFENDANT

JUDGMENT

Introduction and Background

1. The plaintiff instituted this suit against the defendant vide a plaint dated 28/7/2017. The claim rests on an agreement entered into between the parties on or about March 2015, by which the defendant agreed to be the sole distributor for the plaintiff's products in Kenya. There is no dispute that the agreement was partly oral, partly in writing and partly by conduct.
2. The plaintiff contends that on diverse dates between March and December 2015, the defendant placed orders with it for the supply of products valued at USD 1,790,960.12. Pursuant to the terms of the agreement the plaintiff delivered the goods and issued the defendant with invoices for the products delivered. The invoices set out the period within which the defendant was obligated to remit payment for the products. The plaintiff further contends that it advanced credit of USD 127,999 to the defendant to aid in the promotion and distribution of its products.
3. It is the plaintiff's case that out of the amount invoiced, it only received the sum of USD 823,630 from the defendant. The plaintiff's claim is therefore for the balance, being USD 766,155 together with interest and costs of the suit.
4. During trial the plaintiffs called two witnesses; ALEX LEW, the Finance Director of the Sub-Saharan division of the plaintiff company, as PW1 and EMMANUAEL KOFI HUSSEIN, the Legal Director for Sub-Saharan Africa employed by the plaintiff, as PW2. Since their testimonies echo the plaintiff's



claim on the plaint and their witness statements, I shall not regurgitate the same save to refer to their testimonies in my analysis.

The defendant's case:

5. In its reply to the claim, the defendant filed a further amended defence, set-off and counterclaim dated 11/5/2023. The defendant acknowledges the agreement, but raises several defenses and counterclaims, arguing that the plaintiff breached its obligations under the agreement by, among other things, failing to provide adequate marketing and promotional support, delivering expired products with a shorter-than-agreed shelf life, and failing to prevent third parties from infringing on the defendant's exclusive distributorship rights.
6. The defendant seeks to set off its counterclaim against the plaintiff's claim. Based on the foregoing, the defendant prayed that the plaintiff's suit against it be dismissed with costs and judgement be entered for the defendant on the counterclaim
7. The defendant's case was supported by DW1, DAVIES MUKURIA, DW2 MORRIS OYUYO, the Finance Controller of the defendant company and DW3, LINUS GITAHU, the Chairman of the Board of Directors in the defendant company. The testimonies of the three are as contained in their respective witness statements. I shall refer to them variably in the analysis that follows.

Analysis and determination:

8. I have carefully considered the pleadings, submissions, evidence and authorities cited by the parties. The following key issues arise for determination:
 - i. What was the nature of the agreement between the parties;
 - ii. Whether the plaintiff is entitled to claim the sum of USD 766,155, or any part of it, together with interest thereon from the defendant;
 - iii. Whether the defendant is entitled to a set off of USD 771,878.75 and a further sum of USD 397,567.41 together with interest thereon from the plaintiff;
 - iv. Which party should bear the costs of the suit;

What was the nature of the agreement between the parties?

9. There is no dispute regarding the existence of a business relationship between the parties. While the plaintiff claims this relationship began in March 2015, the evidence strongly supports the defendant's assertion that it commenced earlier, in January 2015. Specifically, at page 9 of the defendant's exhibit 1, there is correspondence, including emails, that date back to January 2015, clearly substantiating this timeline. The email dated 8/1/2015 appearing on page 10 of the same exhibit documents a stock order placed by the defendant with the plaintiff, further corroborating this start date. This was additionally confirmed by PW1, who in examination in chief stated that, "our distributorship relationship commenced in January 2015."
10. In light of this compelling evidence, I conclude that the business relationship began in January and not March 2015.
11. Even then, at the core of this dispute, is the question as to the nature of the agreement that the parties entered into. The plaintiff contends that the same was a sale of goods agreement while the defendant is



emphatic that it was a distributorship agreement. The plaintiff relies on the definition of a sale of goods contract as provided for under section 3(1) of the [Sale of Goods Act](#). It defines the same as follows:

“A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price.”

12. A distributorship agreement, though not defined in statute, differs significantly from a standard sale of goods contract. In my view, the same is an arrangement between a supplier - either a manufacturer or wholesaler, and a distributor, which sets out the terms under which the distributor is authorized to sell or distribute the supplier's products.
13. Such agreements typically outline aspects like pricing, payment terms, exclusivity, the distributor's responsibilities (including marketing efforts and sales targets), and the ownership of intellectual property. It is therefore evident that a distributorship agreement encompasses broader responsibilities beyond the mere sale of goods.
14. By its nature therefore, a distribution agreement establishes a long-term, ongoing business relationship, whereas a typical sale of goods contract pertains to a one-time transaction or a limited series of transactions. In other words, once the sale is completed and the goods are delivered, the sale of goods contract comes to an end.
15. A review of the record clearly shows that both parties intended their relationship to be a distributorship agreement. Besides the lengthy period of trade between the parties, the plaintiff explicitly refers to the defendant as its distributor. This is evidenced by amongst others, a letter at page 8 and email at page 9 of the defendant's exhibit 1. In some instances, the plaintiff confirms that the defendant is its sole authorized distributor in Kenya, as seen in the letter at page 1 of the plaintiff's bundle of documents.
16. Additionally, there is abundance of correspondence on record which highlights discussions between the parties on price agreements, minimum order requirements, and obligations for marketing and promotion of the plaintiff's products, all of which are characteristic of a distributorship arrangement.
17. I am therefore persuaded by the defendant's position that the agreement between the parties imposed broader responsibilities and obligations than those found in a typical sale of goods contract. Consequently, the [Sale of Goods Act](#) does not apply to the transaction in question. In my view, what should guide the court in resolving this dispute is the contractual terms agreed between the parties.
18. The existence of such an agreement and terms is further alluded to in a caption that appears in some of the plaintiff's invoices, in the terms that:

“Where a current Distribution Agreement exists between the parties, the sale is made pursuant to that agreement. Where no such agreement exists, the sale confirms the Buyer's exclusive assent to the Trading Terms circulated by Kellogg's.”
19. In addition to the invoices and other documents of trade, both parties are correct in asserting that the terms of their agreement are also reflected in oral conversations, written correspondence, and the established conduct of their dealings.
20. Having found that there existed a distributorship agreement between the parties, the process of ordering, delivery, and payment seems to have been well established, as evidenced by the interactions between them. It is also evident to me that time was of the essence in the agreement. This is particularly with respect to the time taken by the plaintiff to fulfill an order, from the moment it was placed by the defendant until the goods were delivered.



21. I base this conclusion, among other things, on an email dated 8/1/2015, found on page 10 of the defendant's exhibit 1, in which the defendant inquired whether the supply lead time for Pringles was still 50 days.
22. According to the Oxford Languages (online) dictionary, the word "still" implies continuity, meaning up to and including the present time. In this context, it suggests that 50 days was the established supply lead time between the parties. PW1 confirmed during cross-examination that the plaintiff sells perishable products and stated, 'in this matter, time was of the essence... due to the perishable nature of the goods'. The witness further confirmed that 'the products would take 50 days to move from Manchester to Mombasa'.
23. Beyond this, I find no evidence of any other established trade usage or correspondence indicating that the parties had specifically agreed that the plaintiff would deliver products with a shelf life of more than 12 months. This assertion by the defendant, therefore, has not been proven.
24. It can also be discerned from the record that the plaintiff was responsible for executing and funding the marketing and promotional activities for its products. An email, found on page 9 of the defendant's exhibit 1, confirms that the plaintiff's Regional Sales Manager was stationed in Nairobi to oversee this responsibility. Additionally, an email dated 5/3/2015, on page 16 of the same exhibit, confirms that the plaintiff had developed a comprehensive marketing strategy for its products.
25. DW2 testified that the defendant's role in this strategy was to create a concept and provide a budget for the marketing, which would then be submitted to the plaintiff. This suggests that the final decision ultimately rested with the plaintiff.
26. The defendant takes issue with the plaintiff for failing to provide this support as agreed upon by the parties. The evidence on record indicates that the plaintiff had proposed an intensive 360-degree marketing initiative to coincide with the arrival of the first consignment of products in Kenya. DW2 testified that the plaintiff did not undertake the anticipated 360-degree marketing initiative even after the defendant had submitted the proposal.
27. The plaintiff has not provided any evidence to rebut these averments. The defendant argued that the failure to execute the marketing strategy had a ripple effect on sales, eventually leading to the products not selling and expiring.
28. It is also evident that the terms of sale were based on credit. The invoices provided clearly show that the defendant was entitled to a 75 or 90-day credit period. The existence of a valid credit application agreement signed on 21/1/2015 is however, disputed. The plaintiff relies on this agreement to assert certain terms of the contract between the parties. The defendant, on the other hand, argues that this agreement was neither pleaded in the plaint nor properly executed by the defendant.
29. I have carefully considered the submissions and authorities on this point. The defendant referred this court to the decision in Electoral and Boundaries Commission & Another V Stephen Mutinda Mule & 3 Others, [2014] eKLR and Njeru & Another V Nyakundi, [2022] KEHC 13963 (KLR).
30. Both of these decisions emphasize the fact that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection, since pleadings are the bedrock upon which all the proceedings derive from.
31. I have reviewed the plaint against this background. Notably absent from paragraph 5, where the plaintiff outlines the terms of the contract, is any reference to the credit agreement. I also observe that the defendant did not mention it in its pleadings. Introducing such an agreement at this late stage not



only violates established rules of practice and procedure but also raises questions about the plaintiff's attempt to rely on terms that were neither pleaded nor disclosed from the outset of the trial.

32. Moreover, the series of emails and correspondence exchanged between the parties makes no reference to the credit agreement or its terms. The absence of any documented acknowledgment of the agreement in the dealings between the parties' casts doubt as to its application. It is, therefore, unsurprising that, despite the agreement being witnessed, it was not properly executed as it lacks the necessary stamp or signature from an authorized officer of the defendant company. For these reasons I am persuaded by the defendant that the said agreement should not be considered by the court as setting out the terms of agreement between the parties.
33. Having set out the relevant terms of the agreement as evidenced by the documents on record, I shall now proceed to consider the other substantive issues arising against this background.

Whether the plaintiff is entitled to claim the sum of USD 766,155 together with interest thereon from the Defendant?

34. The plaintiff's case is that on diverse dates between March and December 2015, the defendant placed orders valued at USD 1,790,960 for various products. The defendant confirms this assertion in their pleadings and confirms having placed orders for the goods from the plaintiff.
35. There is evidence showing that these products were dispatched to the defendant as demonstrated by the various import declaration forms, found at pages 4-48 of the plaintiff's bundle of documents. In these documents, the defendant is named as the importer while the plaintiff is named as the seller. The first form was issued on 19/4/2015 while the last one was issued on 10/11/2015.
36. It is also evident that invoices were duly issued for the products upon dispatch. The invoices, which are addressed to the defendant, provide that payment was to be made either within 90 or 75 days. Copies of the invoices dated between 3/3/2015 and 28/12/2015 are found on pages 49-211 of the plaintiff's bundle. The defendant provided no evidence to refute the plaintiff's claim that they were yet to settle an outstanding balance of USD 766,155, or to show that this amount had been settled.
37. I also note that the defendant does not in fact dispute that some of the invoices remain unpaid, but instead offers justification for not settling them. Based on the evidence presented, I find that, on a balance of probabilities, the plaintiff's claim has been proven.

Whether the defendant is entitled to a set off of USD 771,878.75 and a further sum of USD 397,567.41 together with interest thereon from the plaintiff?

38. The details of the defendants' claim are as provided in paragraph 47 of the further amended defence, set off and counterclaim. The particulars of the claim are itemized into the following headings which I shall separately consider in light of my earlier observations on the terms of the contract.

Promotion costs incurred by the defendant between February and August 2016:

39. The defendant claims promotion costs of USD 11,529.75 with respect to banding and sleeving costs and USD 39,124.84 with respect to consumer sampling by Hallmark. These costs were incurred between February to August 2016.
40. In order to prove its claim, the defendant provided an invoice for USD 11,529.75. The same appears at page 36 of defendant's exhibit 1 (page 53 of exhibit 2). The invoice is addressed to the plaintiff and even though it is undated, the same appears to have been approved on 12/7/2016, within the period of



the claim. The presumption is that the amounts were meant to reimburse the defendant for banding costs expended.

41. The corresponding evidence of payments made towards the promotions and promotional materials is found at pages 54 – 57 of the defendant’s exhibit 2. I have reviewed the invoices attached and the evidence of payment made to a company known as Statpack. The following payments have been substantiated as having been incurred; Kshs. 131,544/= in the invoice dated 17/6/2016; Kshs. 98,553.60 in the invoice dated 20/6/2016; Kshs. 522,000/= in the invoice dated 28/6/2016 and Kshs. 63,800/= in the invoice dated 16/06/2016.
42. Against this evidence the plaintiff attached Credit Memos at pages 213 and 214 of its documents, issued by Kellogg Marketing and Sales Company Limited, presumably towards meeting marketing and promotion costs of its products. There is also a Debit Note at page 216 of its bundle of documents referenced Kellogg’s and Pringles promotion. I note that the documents relate to diverse dates in 2015 and cannot on the face of it be presumed to have covered the costs in the said invoices of 2016.
43. It was up to the plaintiff to prove that the credit memos covered the costs claimed by the defendant. In the absence of any such evidence, I find that the defendant has proved the claim as far as the invoices mentioned above are concerned, amounting to Kshs. 815,897.60, at the applicable exchange rate during the period.
44. I have not found any basis or evidence for the claim of USD 39,124.84 relating to consumer sampling by hallmark. The claim does not tally with the invoice on page 52 of the defendant’s exhibit 2 and is therefore unsubstantiated.
45. Worth citing at this point is the Court of Appeal decision in the case of Great Lakes Transport Co. (U) Ltd V Kenya Revenue Authority, [2009] eKLR. The court noted as follows with respect to proof of payment of monies:

“We take cognizance of the fact that an invoice is not a receipt for goods supplied unless it is specifically endorsed to the effect that the goods for which invoice was prepared were paid for. In such a case the endorsement should be visible on the invoice and then the invoice plus the endorsement on it can be treated as receipt for payment. What we mean is that in case the goods for which an invoice is issued have been paid for, one would normally expect endorsement such as the word “PAID” on the invoice and that would turn the status of the invoice into a receipt.”

Destruction costs and duties paid on destroyed products:

46. The defendant claims the amount of USD 340,229.51 under the above heading.
47. The claim arises from the defendant’s complaint that the plaintiff failed to deliver goods within reasonable time and delivered products with a shorter shelf life than 12 months. I have already indicated that the defendant had the onus of providing evidence of such an ‘established practice of trade’ but failed to do so as required under section 107(1) of the *Evidence Act*, which provides that:

“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.”

48. Be that as it may, based on the reasons given earlier, this court is however prepared to find the existence of a custom of trade between the parties whereby the supply lead time for products was 50 days.



49. It is not controverted that the consignment that was ordered, vide the email dated 8/1/2015, arrived on 29/4/2015. The record shows that the arrival of the consignment was intended to coincide with the launch of a marketing campaign. An email dated 5/3/2015, found at page 16 of the defendant's exhibit 1 confirms that the consignment had not yet arrived in the country by then. DW1 confirmed that the defendant had difficulty selling the products due to the short shelf life of the products at the time when they got to the country.
50. What is equally clear from the evidence is that even after this, and throughout the existence of the agreement, the defendant consistently emphasized the negative impact of such delays on sales. On 28/1/2016, the defendant alerted the plaintiff that some of the special stock was at high risk of expiring, as documented on pages 24 and 25 of the defendant's exhibit 1. A similar concern was raised just days later, in an email dated 1/2/2016, found on page 26, of the said bundle, in which the defendant expressed that the volume of goods the plaintiff required them to stock was excessive, further increasing the risk of expiration before sale.
51. By failing to deliver the products in a timely manner and insisting on stocking large volumes, the plaintiff in my view, knowingly assumed the risk of product expiration. The plaintiff directly addressed this issue in an email dated 19/6/2015 found on page 24 of the defendant's Exhibit 1, acknowledging the problem but continuing with its course of action. The email read in part;
- “You will receive a 10% case bonus discount for these purchases ... that the business guarantees rebates in the event of any expired arising from these purchases.”
52. In my view, the plaintiff readily assumed the risk associated with the expiry of the product due to overstock and as such, they cannot be heard to deny this fact. In fact, when it became inevitable that some of the products would expire or had already expired, the plaintiff was actively involved in seeking alternative uses for the remaining stock and exploring options for the destruction of expired products.
53. Eventually it was agreed by the parties that the defendant would proceed to destroy the goods according to the law. The email of 27/5/2016 at page 30 of the defendant's exhibit 1 shows that the plaintiff requested the defendant to provide quotations for approval of destruction costs. While there is no record of such cost of approval being granted, it is reasonable to presume that since the plaintiff had approved the destruction, it was responsible for covering the cost of destruction as per the said email.
54. To support their claim, the defendant submitted certificates of safe disposal, confirmations of disposal, and invoices along with receipts for payments made for the incineration of expired products. After reviewing the documents, and based on the Great Lakes Transport Co (U) Ltd case, (supra), I am satisfied that the following invoices have corresponding receipts, as evidenced in the defendant's exhibit 1: Kshs. 588,000.71 on page 39, Kshs. 855,901.03 on page 41, Kshs. 1,690,802.06 on page 42, and Kshs. 202,800.25 on page 43. Additionally, the payment of Kshs. 737,999.97 on page 28 is found in the defendant's exhibit 2.
55. These costs, amounting to Kshs. 2,428,801.97 have been proved and are refundable to the defendant at the applicable exchange rate at the time.
56. Regarding the claim for duty paid on destroyed items, the defendant attached a duty rebate note at page 21 of exhibit 1 for USD 7,284. It is not possible to tell, on that alone, whether the duty was paid as there is no corresponding evidence of payment. It is also not clear whether the rebate relates to specific expired products that were destroyed as there is no itemization or description of the costs. This claim cannot therefore succeed.



Inspection penalty costs:

57. The defendant claims a total of USD 6,683 for costs incurred due to an inspection penalty. DW1 testified that it was the plaintiff's responsibility to ensure that the products were inspected and certified prior to entering the country. However, due to the plaintiff's failure to fulfill this obligation, the defendant was forced to bear the costs associated with the penalty and inspection, and now seeks reimbursement for these expenses.
58. The defendant's witness relied on the email communication at page 4 of the defendant's exhibit 1 to prove that the plaintiff was responsible for paying and obtaining the Certificate of Conformity. However, after reviewing the email dated 13/11/2014, I find no indication or confirmation that the plaintiff assumed this responsibility.
59. I have equally considered the evidence at page 14 of the defendant's exhibit 1, which is a Quality Inspection Demand Note from KEBS dated 29/4/2015 for Kshs. 601,478/=. There is also an invoice cum delivery note addressed to the plaintiff, at page 15 of the same exhibit 1. The amount indicated as inspection fees is USD 6,683.09. There is no corresponding evidence of payment of either of the documents and as such the defendant has not proved this claim.

Disposition

- a. Accordingly, I find merit in the plaint and grant judgment in favour of the plaintiff against the defendant for the principle sum of USD 766,155.
- b. The defendant's counterclaim and set-off partly successful in the following terms. That judgment is entered in favour of the defendant and against the plaintiff for:
- (i) Kshs. 815,897.60 being promotion costs, at the applicable exchange rate during the relevant period; and
 - (ii) Kshs. 2,428,801.97 being destruction costs, at the applicable exchange rate during the relevant period;
- c. The amount in [b] above shall be set off against the plaintiff's claim.
- d. Interest shall be payable from the date of filing suit until payment in full of respective amounts due.
- e. Each party shall bear their own costs.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 18TH DAY OF OCTOBER 2024.

F. MUGAMBI

JUDGE

