



Bollore Transport and Logistics Kenya Limited v VS Hydro Kenya Limited (Civil Suit E143 of 2021) [2023] KEHC 19177 (KLR) (Commercial and Tax) (16 June 2023) (Judgment)

Neutral citation: [2023] KEHC 19177 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT E143 OF 2021
EC MWITA, J
JUNE 16, 2023**

**BETWEEN
BOLLORE TRANSPORT AND LOGISTICS KENYA LIMITED PLAINTIFF
AND
VS HYDRO KENYA LIMITED DEFENDANT**

JUDGMENT

1. The plaintiff filed a suit against the defendant claiming USD 292,635.34 and EUROS 10,403.26 being the balance due for services rendered. The plaintiff and the defendant had entered into an agreement in which the plaintiff was to provide cargo and logistics services to the defendant from time to time at an agreed amount.
2. In order to guarantee payment once due, the defendant provided a guarantee for USD 250,000 from Credit Bank Plc. in favour of the plaintiff.
3. The plaintiff provided services to the defendant from time to time, but the defendant failed to pay USD 519, 863.34 and EUROS 10,403.26 for services rendered despite demand made. The guarantee of USD 250,000 was utilised to offset the amount due, leaving a balance of USD 292,635.34 and EUROS 10,403.26 unpaid.
4. The defendant filed a statement of defence, denying that there was an agreement for supply of services as claimed. The defendant however admitted providing the guarantee but stated that it was entirely on a without prejudice basis.
5. The defendant denied any outstanding balance and averred, in the alternative, that if there was any outstanding amount, it was due to the plaintiff's failure to raise invoices in line with the defendant's financial policies.



6. Regarding use of the guarantee to offset the amount claimed, the defendant stated that the guarantee was applied against uncontested payments whose invoices had been raised in compliance with its financial policies.
7. When the suit came up for hearing on 13th February, 2023; a date that had been taken by consent of parties, counsel for the defendant informed the court that their witness was not in court even though the hearing date had been communicated to him. Counsel applied for an adjournment to file an application for leave to cease acting. The application was opposed on grounds that counsel had sufficient time to secure his witness' attendance or file an application for leave to cease acting.
8. The application for adjournment was declined. The court noted that the defendant's counsel had earlier requested for time amicably settle the matter but this had not happened. Counsel had also not filed the application for leave to cease acting if indeed that was their desire. The court ordered the hearing to proceed
9. Although the defendant's counsel was in court when the court ordered that the hearing would proceed, counsel did not turn up for the hearing when the suit was called out.
10. Zipporah Kiverenge, the plaintiff's credit controller, testified on behalf of the plaintiff and adopted her witness statement filed together with the plaint. The witness also produced the bundle of documents as exhibits. Ms. Kiverenge told the court that the defendant owed the plaintiff the amount claimed in the plaint, and pointed out that the defendant had stated in the witness statement filed in court that it was willing to settle the amount but had not done so.
11. According to Ms. Kiverenge, the plaintiff rendered services to the defendant as shown in the invoices and documents produced in support of the claim but the defendant did not pay, dispute the amount or seek reconciliation of accounts. Ms. Kiverenge asserted that the defendant owed the amount claimed in the plaint and urged the court to allow the claim as prayed.
12. I have considered the pleadings, evidence on record and the exhibits produced in support of the plaintiff's case. As already stated, the hearing proceeded in the absence of the defendant's counsel who was present when the court ruled that the hearing would proceed but did not turn up during the hearing.
13. The plaintiff's claim is for the balance of the amount due for cargo and logistics services that were rendered to the defendant. The plaintiff adduced evidence to show that services were indeed rendered to the defendant but were not fully paid for. The plaintiff's witness produced invoices and other documents to support the claim. The defendant did not call evidence to controvert the plaintiff's evidence.
14. I have perused the Bank guarantee dated 18th March 2020 for USD 250,000 issued by Credit Bank Plc. The Bank guarantee was issued on behalf of the defendant in favour of the plaintiff. It was to guarantee credit facilities for cargo logistics services.
15. The plaintiff produced invoices for services rendered which the defendant did not deny. The plaintiff again produced demand letters sent to the defendant but which were not responded to. The defendant did not also deny owing the amount claimed.
16. The plaintiff stated that the Guarantee was utilised to offset the due amount leaving the balance claimed in the plaint. The defendant's response in the defence was that the guarantee was used for undisputed invoices. Even though the invoices produced as exhibits were served on the defendant, the defendant did not say that those invoices were disputed and why. The defendant seemed to argued in the defence



that if any invoices were unpaid, they had not been issued in compliance with its finance policy, without saying what the policy was.

17. The defendant had filed a witness statement in which the witness stated that the defendant was willing to pay the outstanding amount once accounts reconciliation had been done. The defendant did not show that it had sought accounts reconciliation and whether or not this had been done.
18. In the circumstances, it is clear to the court that the plaintiff's evidence that the defendant owed the amount claimed in the plaint had not been controverted. I am, therefore, satisfied that the plaintiff has proved its case on a balance of probability.
19. Consequently, Judgment is hereby entered for the plaintiff against the defendant for USD 292, 635.34 and EUROS 10,403.26 respectively. The amount shall attract interest at court rates from the date of filing suit until payment in full. The plaintiff shall also have costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 16TH DAY OF JUNE 2023

E C MWITA

JUDGE

