



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KERICHO**

**CIVIL CASE NO. 6 OF 2017**

**RUSU INVESTMENTS LTD.....PLAINTIFF**

**VERSUS**

**KAISUGU LIMITED.....DEFENDANT**

**JUDGMENT**

1. The plaintiff herein, **RUSU INVESTMENTS LIMITED** filed a plaint dated 5/7/2017 against **KAISUGU LIMITED** seeking the following orders:

(i) THAT the plaintiff is entitled to harvest one tone of poles for every 2.5 tons of firewood supplied to the defendant in respect of 4,637,490 Kg supplied in accordance with a verbal agreement entered between the parties.

(ii) In the alternative, the plaintiff is seeking for an order that the Defendant pays them a sum of Kshs.31,899,451.20 being the value of the firewood supplied by the plaintiff to the defendant together with interest and costs.

2. The Defendant filed a statement of defence dated 1/8/2017 denying the plaintiff's claim.

3. The plaintiff called two witnesses during the hearing of the case while the Defendant called one witness.

4. The plaintiff's evidence was that plaintiff through it's direction **AMIT PREMCHAND (PW1)** entered into a verbal agreement with the Defendant's director **CHARLES KIPNG'OK** in the presence of the plaintiff's supplier **ALEX YEGON (PW2)** on the understanding that for every 2.5 tons of firewood, the plaintiff was to be allowed to harvest one kilogram of blue gum wooden poles.

5. The plaintiff's director PW1 further said between August 2012 and September 2013, the plaintiff supplied the Defendant with firewood totaling 4,637,490 kilograms.

6. PW1 said the 4,637,490 kilograms supplied translated to Kshs.4.00 per kilogram and if they were not able to give the poles they would pay at that rate.

7. PW1 said PW2 used to deliver the firewood and he used to be issued with weighbridge tickets. PW1 also produced computer generated transaction listing registers to show the firewood was delivered. PW1 said he made efforts to be paid but the defendants director gave excuses that the plantation was not ready for harvest and in 2016, he wrote a demand letter to be paid in monetary terms.

8. Finally PW1 instructed their lawyer who wrote demand letter dated 8/3/2017 and filed this suit. PW1 produced the way bridge tickets and the transacting visiting registers as exhibits.

9. **PW2 ALEX YEGON** said he was present when the verbal contract was entered into between **PW1 and CHARLES KIPNGOK** who was the director of the Defendant company.

10. PW2 also said he supplied the firewood amounting to 4,637,490 kilograms or 4,637 tons.

11. The Defendants called one witness **GILBERT KIPROTICH TOO (DW1)** an employee of the Defendant who said that if firewood was supplied in 2012 they would have been invoiced.

12. DW1 also said they have a laid down procedure for supply of goods such as issue of LPO which would confirm whether goods were supplied.

13. DW1 said the laid down process was not followed and the documents produced by the plaintiff are not recognized by the Defendant as the same were computer generated and they were not signed or stamped by the Defendant.

14. The parties filed written submissions which I have considered. I find that it is not in dispute that both the plaintiff and the Defendant are limited companies.

15. The issues for determination in this case are as follows:

(i) Whether the plaintiff and the defendant entered into a valid oral contract for the supply of firewood in exchange for wooden poles.

(ii) Whether the defendant is liable to pay the plaintiff the sum of Kshs.31,899,451.20 in the alternative.

(iii) Who pays the costs of this suit?

16. On the issue of the whether the Plaintiff and the Defendant entered into a valid oral contract, the court of Appeal in **Ali Abid Mohammed versus Kenya Shell & Company Limited (2017) eKLR**, stated that a contract between parties can exist where no words have been used but where it can be inferred from the conduct of the parties that a contract has been concluded. The court said;

*“It therefore follows that a contract can exist where no words have been used but where it can be inferred from the conduct of the parties that a contract has been concluded. See **Timoney and King v King** 1920 AD 133 at 141. In the circumstances of the instant case, there existed an enforceable contract between the parties by reason of Conduct. Indeed, it was not disputed by the respondent that it supplied petroleum products to the appellant at a specific amount per liter and for a certain period of time.”*

17. This therefore shows that a contract need not be in writing but can be inferred from the conduct of the parties.

18. The court of Appeal in **William Muthee Muthami versus Bank of Baroda (2014) eKLR**, stated that for a contract to be valid under the law of contract, it must be proved that there was offer, acceptance and consideration.

*“In the law of contract, the aggrieved party to an agreement must, in addition, prove that there was offer, acceptance and consideration. It is only when those three elements are available that an innocent party can bring a claim against the party in breach.”*

19. Further, in **Charles Mwirigi Miriti versus Thananga Tea Growers Sacco Limited and Another (2014) eKLR** the court of appeal stated that it is trite that there are three essential elements for a valid contract. That is an offer, acceptance and consideration.

20. I therefore find that the plaintiff called two witnesses in support of the plaintiff's case.

21. PW1 and PW2 were present when the oral agreement was entered into. The two witnesses gave consistent evidence which is corroborative and the plaintiff produced documents from the weighbridge and also transaction registers to show the goods were delivered. PW2 is the person who delivered the goods.

22. I find that the oral agreement contains all the elements of a valid contract such as offer and accepted consideration and consent of the parties. The terms of the contract were also clear.

23. I find that both the Plaintiff and the Defendant are limited companies and it has not been denied that **CHARLES KIPN'GOK** was a former director of the Defendant company.

24. I find that the Plaintiff has proved its case on a balance of probabilities and I accordingly find that the Defendant is liable to pay for the firewood delivered by the Plaintiff.

25. Since the Defendant has failed to give the plaintiff the blue gum poles agreed, I allow the alternative prayer for payment of Kshs.31,899,451.20.

26. Judgment is accordingly entered in favour of the Plaintiff against the Defendant in the sum of Kshs.31,899,451.20 together with costs and interest at court rates from the date of filing suit until payment in full.

27. Right of appeal 28 days granted to the Defendant. Orders to issue accordingly.

**Delivered, signed and dated at Kericho this 5<sup>th</sup> day of February 2021.**

**A. N. ONGERI**

**JUDGE**