



IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL CASE NO. 321 OF 2015

BETWEEN

BETA HEALTHCARE INTERNATIONAL LTD.....PLAINTIFF

AND

STEPHEN MUKITA T/A MUSTEKY ENTERPRISES.....DEFENDANT

JUDGMENT

1. The plaintiff's case against the defendant is for goods sold and delivered. In the Amended Plaint dated 5th June 2017, the plaintiff seeks judgment against the defendant for Kshs. 42,398,734.22 together with costs and interest at commercial rates.
2. The plaintiff's case is that sometime in 2012, the defendant started purchasing pharmaceutical products from it on cash terms for sale to its customers at his shop located at the OTC Bus Terminus within Nairobi. On 7th August 2012, the plaintiff allowed him to purchase goods on credit terms at an initial limit of Kshs. 5,000,000.00. The credit limit was varied from time to time until it was increased to Kshs. 45,000,000.00.
3. Between 2014 and 2015, the plaintiff supplied pharmaceutical goods worth Kshs. 42,271,684.22 to the defendant upon his request and upon him undertaking to pay the same within the credit periods provided.
4. The plaintiff's witness, Mr. Hilary Langat (PW 1), the Finance Manager, testified about the relationship and produced delivery notes and invoices do support the claim. All the delivery notes produced have the stamp of Musteky Enterprises confirming that the goods were delivered and the same were matched to corresponding invoices.
5. PW 1 also produced copies of 70 cheques amounting to Kshs. 15,945,000.00 which the defendant issued between 9th May 2015 and 19th August 2015 and which were dishonoured on presentation. PW 1 stated that the plaintiff incurred bank charges amounting to Kshs. 127,050.00 and which it also claims.
6. PW 1 further recalled that the plaintiff issued a demand letter dated 31st March 2015 calling on the defendant to pay the debt that was now amounting to Kshs. 42,071,684.22 but he failed to pay. However, after issuing some cheques which were dishonoured and following discussions, the defendant admitted in a letter dated 13th May 2015 that he would ensure that the cheques given to the plaintiff would not be dishonoured.
7. The defendant filed a defence and counterclaim dated 19th July 2015 in which he denied the debt. He alleged that the plaintiff delivered goods to him for storage purposes and that sales were conducted by the plaintiff's agents who paid money which was transmitted to the plaintiff directly. He further stated that he issued cheques to the plaintiff against cheques issued to him by the plaintiff's customers which were dishonoured. He however stated that he replaced the dishonoured cheques.
8. In his counterclaim, the defendant averred that the plaintiff leased his store at the OTC Bus Terminal and it was agreed that the plaintiff's rent would be pegged on the sales of merchandise stored in the premises. He claims that he was never paid based on the sales and that the plaintiff owes him a substantial sum of money.

9. At this stage, I wish to point out that the defendant did not attend court despite being served with court process as directed by the court.

10. I have considered the evidence and I am satisfied that the plaintiff has proved its case on the basis of the delivery notes and invoices produced by PW 1. The claim is also supported by the dishonoured cheques issued by the defendant and his own admission in writing. The defendant did not call any evidence to support his defence and counterclaim claim hence the plaintiff's case was uncontroverted. Further, the defendant's defence and counterclaim is an admission that there was a relationship between him and the plaintiff, that the goods delivered to him and that he issued dishonoured cheques.

11. The totality of the evidence is that I find that the plaintiff has proved his case on a balance of probabilities. I dismiss the defence and counterclaim as it is not supported by any evidence.

12. The plaintiff prayed for interest at commercial rates but there the was no evidence that the parties agreed to such a rate of interest or that it could be implied by custom and usage. I award interest at court rates from the date of filing suit.

13. As a result of the foregoing, I order as follows:

a. Judgment be and is hereby entered for the plaintiff against the defendant for the sum of Kshs. 42,398,734.22.

b. The sum in (a) shall accrue interest at 12% pa from the date of filing suit until payment in full.

c. The defendants defence and counterclaim is dismissed.

d. The defendant shall pay costs of the suit.

DATED and DELIVERED at NAIROBI this 5th day of FEBRUARY 2020.

D. S. MAJANJA

JUDGE

Mr Makhanu instructed by Titus Makhanu and Associates Advocates for the plaintiff.