



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL CASE NO. 301 OF 2014

AGS WORLDWIDE MOVERS (K) LIMITED.....PLAINTIFF

- VERSUS -

JONATHAN KARANJA T/A JONATECH ENTERPRISES.....1ST DEFENDANT

FRANKLIN ALUKONGO.....2ND DEFENDANT

WILSON MUDOGO.....3RD DEFENDANT

JUDGMENT

1. AGS WORLDWIDE MOVERS (K) LIMITED (AGS) is a Limited Liability Company incorporated under the Companies Act. AGS is in the business of packing and shipping of personal effects and/or goods. AGs had employed **FRANKLIN ALUKONGO** (Franklin) in its accounts department and **WILSON MUDOGO** (now deceased) (Wilson) in its warehouse. **JONATHAN KARANJA t/a JONATECH ENTERPRISES** (Karanja) was engaged by AGS from time to time to supply corrugated rolls and newsprint.

2. AGS's case is that between the years 2010 to 2012 Karanja colluded with its employees Frankline and Wilson to defraud it by falsifying delivery notes and invoices which resulted in Karanja being paid by AGS for corrugated rolls and newsprint that was not delivered. AGS claims it lost Ksh 13,400,070 through that falsification.

3. Karanja by his defence denied defrauding AGS and pleaded that he supplied all the invoiced items.

4. Franklin by his defence stated that he was employed by AGs as accounts clerk and was not working in the stores and therefore denied having posted any entries as alleged by AGS. He denied having colluded with Karanja and Wilson to approve, falsify or fake delivery notes and invoices to justify payment to Karanja.

5. AGS relied on the evidence of Gil Recizac (Gil), its managing director. Gil stated that in the year 2007 Karanja went to his office and requested him to engage him as one of the suppliers of the packaging materials. Gil agreed and AGs began to transact business with Karanja.

6. The business between Karanja and AGs was on demand basis. In the year mid 2012 Gil stated that he realised that the cost of material was higher than what AGS was consuming. As a result Gil summoned Karanja, Frankline and Wilson to his office, in February 2012. He raised his concern with them of the discrepancy of the packaging material and its consumption. Karanja promised to avail documents to prove what he delivered to AGs but instead he closed his business, Jonatech Enterprises, and he could not be traced. Wilson absconded from his employment. Frankline had, by November 2011, left the employment of AGS.

7. AGS called its auditor, John Irungu Kamau. The auditor presented his audit report which revealed that between 2010 and December 2011 AGS has paid Karanja Ksh 12,582,040/= for materials not supplied to it. The report also showed that from January to October 2011 AGS paid Karanja Ksh 6,090,580/= for material not supplied to AGS. The auditor's analysis shows that AGS lost Ksh 12,582,040 by payment made to Karanja when Franklin and Wilson were in the employment of AGS and lost Ksh 818,030/= by payments made to Karanja when only Wilson was still in the employment of AGS.

8. Karanja in his testimony confirmed that he had a contract, with AGs, to supply packaging material SFK corrugated material and newsprint. He however stated that the contract was not in writing. That the order of AGs was placed by phone call by Johnson Jumwa Mwamburi, the warehouse manager of AGs. He stated that the goods would be received by various employees of AGS as well as the warehouse manager. Karanja stated that his company was not the only one supplying packaging material to AGS. He described how the

material was received at AGS store on Mombasa Road by stating that it was weighed in kilograms. Karanja also stated that sometimes he was ordered by the warehouse manager to deliver material on site where AGS's staff were undertaking packaging. Karanja at first stated that he did not make deliveries to AGS personally but that it was one of his employees either Joseph Magu or Benson Wanjohi. He however stated later that there were times that he carried out the delivery.

9. Franklin when testifying in Chief alleged that he is implicated in this matter because AGS's managing director was against him for what he termed as the managing director's abuse of office on matters such as of Kenya Revenue Authority (KRA). He further stated that he did not have access to the stock book or the register for materials supplied by suppliers of AGS, that if there were changes made to the stock sheet this was done by the warehouse manager. He stated that some packaging material was supplied, by suppliers, to the AGS's staff on site while at other times the AGS's staff collected the material from the suppliers directly. Franklin stated that it was not part of his job description to receive materials or to pay supplies. That his duties were to make statutory deductions and to deal with AGS's debtors. That he sometimes wrote cheques when those who were supposed to write them were not available. He further stated that AGS's managing director regularly made payments without invoices being presented. Franklin stated that he worked at AGS from 1997 to November 2011.

ANALYSIS

10. The issues needing determination in this matter is:

i. Did the plaintiff pay the 1st defendant for goods not supplied;

ii. If the answer to (i) above is in the affirmative did the 2nd defendant participate in the misrepresentation.

11. My consideration of the first issue will lead me to consider the audit report presented on behalf of AGS. That report sets out the Karanja's invoices that the auditor referred to as non-conforming. Those invoices run for the period in question. I have examined those invoices and they all relate to Karanja's firm, even the one dated 15th October 2011, although in the auditor's report it is reflected as being of eagle stationers, it indeed is one of Karanja's firm. There is clear analysis of the invoice numbers the material allegedly delivered and the shortfall of the delivery. For example in the month of January 2010 Karanja's delivery of corrugated material was reflected in the stock sheets as 546,640kg. The actual amount received was 271,600kg. The amount AGS paid Karanja for corrugated material not delivered was Ksh 275,040. The scenario is repeated over and over in respect to corrugated material and newsprint which totals to ksh 13,400,070/=, not paid for.

12. I am satisfied that AGS has met the standard of proof set out in two cases of the court of appeal: that is **John Mbugua Getao v Simon Parkoyiet Mokare & 4 others (2017) eKLR** thus:

“In the case of **Rosemary Wanjiku Murithi v George Maina Ndinwa (2014) eKLR**, this Court held that proof of fraud involves questions of fact. Simply raising the issue of fraud in a statement of defence and counterclaim is not proof of fraud.”

The other case is **Peter Gicharu Njiriri v Richard Wanyonyi Sitati (2019) eKLR** thus:

“[26] As already stated, the appellant's claim was anchored on fraud. Fraud is defined in **Black's Law Dictionary, 8th edition** as:

“1. A knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment. 2. A misrepresentation made recklessly without belief in its truth to induce another person to act. 3. A tort arising from a knowing misrepresentation, concealment of material fact, or reckless misrepresentation made to induce another to act to his or her detriment. 4. Unconscionable dealing; esp in contract law, the unfair use of the power arising out of the parties relative positions and resulting in unconscionable bargain.”

[27] Thus, the appellant who was alleging fraud had to establish the material facts that were misrepresented by the respondent, and the fact that the misrepresentation or concealment was intended to induce the appellant to act to his detriment or intended to induce another person to act on it.”

13. In this case AGS has provided proof that fraud was committed this is clear from the stock sheets, the invoices, delivery notes and cheques produced to show Karanja benefited from payment when indeed he did not deliver all the material.

14. It follows that in respect to the first issue it is found in the affirmative that is that AGS paid Karanja for goods not delivered.

15. Is there proof that Frankline benefited from such payment? In my view there is sufficient proof.

16. AGS presented bank statements at Equity Bank of Karanja starting from January 2010 to March 2012. What is clear is that there were very frequent withdrawals in cash from that account. Whilst that on its own may not raise any suspicion there is, reflected in those statements that on 20th April 2010 Karanja transferred Ksh 100,000 to Franklin. There are further transfers to Franklin by Karanja as follows, on 20th May 2010 Ksh 90,000, 24TH June 2010 Ksh 88,000, 30th June 2010 Ksh 52,000 and in October 2011, although the amount transferred is not clear I will hazard a guess that it is Ksh 358,500.

17. In Frankline account at Equity Bank for the period March 2010 to November 2010 Karanja's firm transferred into that account ksh 50,000 on 19th March 2010, Ksh 100,000 on 20th April 2010 and Ksh 90,000 on 20th May 2010.

18. Both Karanja and Frankline contradicted each other on why Karanja's firm Jonatech Enterprises was transferring money into Frankline's bank account while Franklin was an employee of AGS, the very company Karanja was supplying packaging material.

19. Karanja at first stated that Frankline was his business partner. This is what Karanja said:

“Franklin was a business partner in that I was borrowing money from his family and then I could refund whenever I get the money.”

Prior to that statement on being asked by his advocate why there was a cash withdrawal from Frankline's account of Ksh 90,000 Karanja stated:

“This cash withdrawal was done on Mombasa road branch. This was the money that was brought to me that was given to me by Franklin and which I deposited on the same day into my account.”

20. On being cross examined by AGS's counsel Karanja stated that his business partnership with Frankline began in the year 2005. Karanja confirmed that between the year 2005 and 2010 he borrowed money from Franklin. Later Karanja confirmed that he knew Frankline's wife by the name of Monica Muiruri. He said that Monica was a Shylock and that he borrowed money from her between the years 2010 and 2012.

21. On the whole having observed the witnesses testify before me I did form the opinion that Karanja and Frankline were not truthful witnesses. There is clear evidence that Franklin participated in the fraudulent acts that led to AGS Loosing money. Although they blamed the weak procedures of AGS to the loss AGS suffered that in my view was not justification in falsifying documents to reflect the incorrect amount of material supplied by Karanja. The fact also that the AGS's auditor did not uncover the illegality that was taking place, is not a reason to excuse the fraudulent acts of karanja and Franklin, together with the late Wilson. In my view the acts that they perpetrated constituted fraud.

22. Although Karanja stated that the materials were delivered to AGS stores by his employees Magu and Wanjohi there was no evidence brought before court proving he indeed has such employees. Even if he had, Jonatech Enterprises, his business, was a business name that he operated. He cannot then escape blame for the wrong doing toward AGS.

23. On the whole I am driven to the conclusion that Karanja defrauded AGS by delivering less of the material than he was paid for and Frankline was party to such fraudulent acts. AGS has provided its case on required standard of proof. There is sufficient evidence supporting the claim.

24. As stated before Franklin left AGS employment in 2011. He therefore will have judgment entered for the amount AGS lost in 2010 to 2011.

25. The costs of this suit shall follow the event, and the event is that AGS has succeeded in its claim.

DECISION

26. The Judgment of the court is as follows:

a. There shall be judgment for the plaintiff jointly and severally against Jonathan Karanja and Franklin Alukongo for Ksh 12,582,040 plus interest at court rate from the date of filing suit until payment in full.

b. There shall be judgment for the plaintiff against Jonathan Karanja for Ksh 818,030 with interest at court rate from the date of filing suit until payment in full.

c. Both Jonathan Karanja and Franklin Alukongo shall pay the plaintiff's costs of this suit.

DATED, SIGNED and DELIVERED at NAIROBI this 4th day of MAY, 2020.

MARY KASANGO

JUDGE

ORDER

In view of the measures restricting court operations due to the **COVID-19 pandemic** and in light of the Gazette Notice No 3137 of 17th April 2020 and further parties having been notified of the virtual delivery of this decision, this decision is hereby virtually delivered this **4th** day of **May, 2020**.

MARY KASANGO

JUDGE