



**REPUBLIC OF KENYA**

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

**CIVIL CASE NO. 15 OF 2018**

**TATA AFRICA HOLDINGS (KENYA) LIMITED.....PLAINTIFF**

**VERSUS**

**FARM AFRICA MILLY'S LIMITED.....DEFENDANT**

**JUDGEMENT**

**Introduction**

The plaintiff's claim against the defendant is for payment of USD 203,614; which is made of the unpaid balance in respect of the purchase of three tractors and three units and an unpaid deposit of USD 4,324.

The defendant denied the claim and counterclaimed for a declaration to issue to the plaintiff for being in breach of its obligations for failing to fit three-point linkage for two JD 9410R-410 HP tractors and the missing parts of the two JD 9410-410 HP tractors. The defendant also prayed for an order of specific performance to compel the plaintiff to supply the defendant with the aforesaid items.

Both parties have also claimed costs and interest

**The case for the plaintiff**

The plaintiff called one witness namely Edwin Too (Pw 1), who is its accountant. Pw 1 adopted his witness statement as his evidence. His evidence was that the defendant was their customer, who purchased tractors and farm implements. Imperial bank was to fund the purchases through a hire purchase agreement. The total cost was USD 1, 792, 850. The defendant was to commit themselves in paying a sum of USD 4, 324 direct to the plaintiff, which they never paid. On paper it was shown as having been paid, but in reality it was not paid. This misrepresentation was done because the customer was to be fully funded by the bank.

Thereafter the plaintiff issued a pro-forma invoice to the defendant. The pro-forma invoice shows the price to be USD 1,654,624.00, while the price according to the plaint is USD 1,792,850.00. This increase was because the customer (the defendant) wanted certain gadgets to be fitted onto the tractors, so as to enable them to be fully funded by the bank. Following that agreement, the defendant sent them a local purchase order, which was put in evidence as exhibit Pxx 1.

It was the evidence of Pw 1 that the defendant did not pay the deposit of USD 4324 dollars as required by the letter of offer. It was also the evidence of Pw 1 that they supplied three tractors and three trailers whose total value was USD 359,690 less the cost of the extras that were not fitted whose value was USD was 160,400 with the balance being USD 199,290. The total outstanding balance is USD 203,614, which is made up of USD 4324 being the unpaid commitment deposit plus USD 199,290, being the purchase price of the tractors and three trailers.

It is important to point out that although the bank approved USD 1,792,850 for the purchase of the machinery to be supplied to the defendant, the bank only remitted USD 1,587,660. The difference between the outstanding approved amount (USD 1,792,850) and the remitted amount (USD 1,587,660) was USD 205,190. This USD 205,190 was to be released to the plaintiff by the bank upon the supply/delivery of the remaining unit/equipment which were not in stock. This is clear from the pro-forma invoice dated 10<sup>th</sup> April 2014, which was put in evidence as exhibit Pxx 5.

It was also the evidence of Pw 1 that the pro forma invoice was first sent and was thereafter followed by the local purchase order. In re-examination, Pw 1 testified that the price of the items was based on the second pro-forma invoice of 2014.

Pw 1 further testified that the defendant indicated that they were buying the equipment on the basis of the second pro forma invoice of 2014. He also testified that prices changed due to time. He further testified that when they delivered the machinery, the defendant did not tell them the machinery was not fitted with the gadgets. The defendant has never complained by either e-mail or by letter that the gadgets were not fitted.

## The submissions of the plaintiff

Messrs Muma Nyagaka, counsel for the plaintiff have submitted that their client has established that the defendant is indebted to the plaintiff in the sum of USD 203,614.

Counsel for the plaintiff have also submitted that the defendant offered to purchase machineries through an LPO dated 25<sup>th</sup> October 2013 in the sum of USD 265,000 per unit as opposed to the price shown on the pro-forma invoice in the sum of USD 233,400 per unit, which is a clear indication that the plaintiff did not inflate the price. According to counsel the basis of “top up” was to inflate the price without affecting the base value of the units. Additionally, counsel also submitted that the earlier pro-forma of 2013 is being used by the defendant to cause confusion and to deprive the plaintiff of its entitlements. In this regard, counsel have also submitted that a pro-forma invoice does not in itself constitute a contract. It is merely a quotation. Based on section 3 (1) of the Sales of Goods Act (Cap 16) Laws of Kenya, counsel have submitted that a contract is formed when the offer is accepted and acted upon and valuable consideration given. Counsel have therefore concluded that since no consideration was made within the validity period, there was no contract entered between the parties. They have therefore urged the court to find that the actual price of each unit is USD 265,000 dollars.

The second dispute raised by the defendant is that the units that were supplied were not fitted with RTK (GPS guidance gadgets). The plaintiff conceded this omission. As a corrective measure the plaintiff conceded to a discount of USD 16,000 per unit to the seven units making a total of USD 112,700. The defendant’s account was credited accordingly. Counsel have submitted that the defendant in paragraph 8 of the defence has averred that:

*“the plaintiff gave a credit note of USD 160,000 to the defendant which was inaccurate as it did not cover the entire inflated amount payable back to the defendant.”*

The above averment is in the nature of a special claim, which in law ought to have been pleaded and strictly proved. In that regard, counsel cited the case of *Provincial Insurance Co. East Africa Ltd v Nandwa [1995-1998] EA 288*, as the authority for their proposition. According to counsel the defendant has not specified the alleged inaccuracy in its defence.

Thirdly and the last point the defendant’s dispute is that the plaintiff supplied accessories in the nature of a three-point linkage but failed to install them. The defendant contends that only one accessory was installed to one tractor and/or unit. Counsel for the plaintiff has submitted that the defendant has failed to provide evidence in support of this averment namely that the plaintiff failed to install the alleged three point linkages.

Counsel for the plaintiff also submitted ***“that had the bank paid the full approved payment, as was anticipated, this action could not have necessary. The failure by the bank to make full payment frustrated the Defendant’s efforts in obtaining full financing for the latter equipment.”***

In the light of the foregoing submissions the plaintiff prays for judgement in the sum of USD 203,614 together with interest at 18 0/0 from 7<sup>th</sup> September 2015 till payment in full and interest thereon together with costs of the suit.

## The case for the defendant

The defendant called Sivar Kumar Pinnamaraj (Dw 1) as its only witness. Dw 1 testified that he is the operations manager of the defendant. Dw 1 adopted his witness statement as his evidence. DW 1 testified as follows. In 2013 the parties entered into negotiations through an exchange of documents including pro forma invoices, local purchase orders and invoices from the seller with a view to buy tractors and heavy machinery from John Deere. Tata Africa was the authorized dealer of John Deere products in Kenya. Each tractor was to cost USD 233,400, which price included RTKS. The latter are the GPS guiding systems. The second part of the tractor was *“a three-point linkage.”* The total cost of the equipment was USD 1,591, 984. At the suggestion of the plaintiff the price was inflated to enable the defendant to get full credit note. The inflated price was to enable the defendant to service the loan in the short time. The inflated price was called *“top up.”* As a result, the inflated price was USD 265,000 for each tractor.

Furthermore, Tata Africa then sent the invoices to the bank. The bank finally disbursed a sum of USD 1, 591, 984.

Dw 1 continued to testify that based on the agreed price the plaintiff owes them a sum of USD 47,500 for each of the three tractors, which comes to a total of USD 142,500. Additionally, Dw 1 testified that the defendant also owes them USD 255. The 255 USD dollars is made up of the top up and the value of the unsupplied RTKS. The sum in respect of RTKS is USD 112,700 and the sum in respect of Top Up is USD 142,500.

Dw 1 admitted that the plaintiff owes them a credit note for USD 160,400, thus leaving a balance of USD 94,800 (USD 255,200 subtract USD 160,400 is equal to USD 94,800).

Furthermore, Dw 1 continued to testify that the plaintiff has not given them USD 94,800 dollars. They should subtract USD 94,800 from the claim of the plaintiff in the sum of USD 203,614 leaving an unpaid sum of USD 108,814 due and owing to the defendant from the plaintiff.

Dw 1 also testified that the plaintiff installed the linkage for one tractor only. They did not install the linkages for the other two tractors. The current installation cost is Kshs 2,773, 364.70, which now the defendant claims from the plaintiff. Based on his calculations they only owe the plaintiff USD 81 dollars, which is arrived at as follows. USD dollars 27,733.647 (which is the equivalent of Kshs 2,773,364.70 at the exchange rate of Kshs 100 to 1 USD) subtract from USD 108,814, which now leaves an unpaid balance of USD 81,000 dollars due and owing to the plaintiff. Dw 1 has also testified that they want to pay the plaintiff the sum of USD 81,000.

While under cross examination, Dw 1 testified that according to them the price for each tractor is USD 233,400 while according to the plaintiff the price of each tractor is USD 265,000. It was his evidence that their computation is based on the pro-forma invoice of 2013, while Tata Africa is relying on the 2014 pro forma invoice. He also testified that the local purchase order of 2014 did not specify that they ordered tractors with RTKS. Furthermore, he also testified that since 2015 they had written to Tata Africa via e-mail that they (the plaintiff) did not install the linkages for two tractors. When asked as to whether he had those e-mails in court during the trial, Dw 1 replied that he did not have those e-mails. Tata Africa supplied the two linkages but did not install them. He testified that these linkages are vital to the operations of the two tractors.

However, Dw 1 admitted under cross examination that they did not pay the deposit of USD 4,324 dollars as required of them. He added that the USD 4,324 is part of the USD 81,000 dollars, which they owe Tata Africa.

While under re-examination DW 1 testified that: *“The difference between the pro forma invoice of 2013 and 2014, lies in the fact that the price was inflated price in the 2014 invoice.”*

#### **THE SUBMISSIONS OF THE DEFENDANT.**

Messrs Garane & Somaine & Co. advocates filed submissions in support of the defendant’s case. In their submissions, they framed two issues for determination. The first issue is in respect of the terms of the agreement between the parties. The second issue is in respect of the amount of money due and owing to the defendant. Their counsel submitted that there was an agreement for sale between the parties, which was based upon the exchange of documents such as invoices and local purchase orders between the parties. This agreement was pursuant to an arrangement for the purchase of the machineries by hire purchase with Imperial Bank Ltd fully financially funding the purchase of the machinery and equipment. The prices were by consent of both parties inflated to enable the defendant obtain financial funding. Counsel further submitted based on *Eslon Plastics (K) Ltd v National Water Conservation and Pipeline Corporation [2014] ECLR and National Bank of Kenya Ltd & Another [2002] EA 503*, which held that a court cannot write a contract for the parties and the parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved.

Furthermore, counsel have submitted that: *“whereas the plaintiff is acknowledging that the fact that there was an agreement to inflate the price, it is not showing how and for what purpose.”*

Counsel have therefore urged the court to be guarded by the defendant’s submissions.

On the second issue for determination, which is in regard to the amount of money owed by the plaintiff to the defendant, counsel have submitted that the defendant acknowledges being indebted to the plaintiff. It denies that the indebtedness is in the sum of USD 203,614. Based on the defendant’s calculations, counsel have submitted that the defendant is only indebted to the plaintiff in the sum of USD 80,000, which it urges the court to uphold.

#### **The issues for determination.**

I have considered the evidence and submissions of the plaintiff and that of the defendant in the light of the applicable law. As a result, I find the following to be the issues for determination.

- 1) Whether the applicable invoice is that of 2013 or 2014.
- 2) Whether or not the plaintiff installed the linkages for the three tractors.
- 3) Who bears the costs of this suit?

#### **ISSUE 1**

I find that it is common ground that the parties entered into the contract for the sale by the plaintiff of nine tractors, two conventional planters and three agricultural tipping trailers, to the defendant, on the basis that the Imperial Bank was to financially fund the entire sale. This is clear from the evidence of Edwin Too (Pw 1). In approving the funding, the bank made it a term of approval that the defendant was to pay directly to the plaintiff a down payment of USD 4,324, according to the bank’s letter of approval dated 14<sup>th</sup> April 2014, which was produced as exhibit P. exh 3.

Based on the bank’s letter of approval, the plaintiff raised and sent a pro forma invoice to the defendant, which was produced as exhibit P.exh 2.

Thereafter, **the bank in its letter of 6<sup>th</sup> May 2014 advised the plaintiff to release the tractors to the defendant, which letter was copied to the defendant.**

Furthermore, in the end the bank released funds for the purchase of only six tractors which were paid for; **leaving a balance of three tractors in respect of which it did not release the funds. In law, this brought to the end the first contract, which was fully funded by the bank.**

On the evidence, I find that neither the plaintiff nor the defendant was to blame for non-delivery of the remaining three tractors to the defendant. This state of affairs was brought about by the bank, which did not release funds for the completion of the contract as anticipated by both parties. According to the letter of release of the tractors dated 6<sup>th</sup> May 2014 of Imperial Bank Ltd addressed to the plaintiff and

copied to the defendant the bank only released USD 1,587,660/- to the plaintiff. The conduct of the bank brought to the end the first contract. This conduct of the bank amounted to a supervening event that was beyond the control of the parties, which in law is technically referred to as *force majeure*. In respect of the doctrine of *force majeure*. See generally **Pankaj Transport PVT Ltd v SDV Transami Kenya Ltd (2017) e-KLR**. In this regard I agree with the submission of counsel for the plaintiff that:

*“that had the bank paid the full approved payment, as was anticipated, this action could not have necessary. The failure by the bank to make full payment frustrated the Defendant’s efforts in obtaining full financing for the latter equipment.”*

Again, I find based on the evidence that the defendant was desirous of having the remaining three tractors delivered to itself. It had two options namely to look for another financier or have them delivered and pay for them. I find that the defendant took the option of the three tractors delivered to it and to pay for them. The question that arises for consideration is as to the terms of this second contract. In this regard, the defendant contends that the terms of this second contract are the ones that are contained in the invoice of 2013. This is based on the evidence of Dw 1, in which he testified that according to them the price for each tractor is USD 233,400 while according to the plaintiff the price of each tractor is USD 265,000. The evidence of the plaintiff through Edwin Too was that the prices changed with time. It is for that reason that the plaintiff relied on the 2014 invoice (exhibit P exh 5) and not the one of 2013 (exhibit Pexh. 2).

I find from the evidence of Edwin Too (Pw 1), and in particular the pro forma invoice dated 10<sup>th</sup> April 2014 (P. exhibit 2) of the plaintiff which was addressed to the defendant has specifically stated that: “*Validity of price: - 30/04/2014*”; that the price changes were due to the passage of time. Furthermore, the defendant took delivery and possession of the three tractors on the basis of the 2014 invoice as testified to by Edwin Too (Pw 1). It also took delivery and possession of the three tractors on the understanding that Imperial Bank Ltd was not funding the purchase of the remaining tractors and units. The funding and terms of the purchase of the remaining three tractors was left to the parties to decide for themselves. **I find that** the defendant did not produce evidence that it complained to the plaintiff about what it now calls the inflated price. The only witness of the defendant (DW 1) struck me as an intelligent but incredible witness in respect of his testimony that he did not come to court with some documents to support his claim that the price of the remaining three tractors and units was based on the 2013 invoice. The defendant cannot be allowed to blow hot and cold simultaneously. It also cannot approbate and reprobate at one and the same time; after taking possession of the three tractors and units, without complaining about the inflated price. Furthermore, it also cannot rely on 2013 invoice due to changes of time as testified to by Edwin Too (Pw 1). The 2013 invoice was no longer operative. It was a dead document and of no value to the parties. It was only of historical value.

Counsel for the defendant submitted that “*whereas the plaintiff is acknowledging that the fact that there was an agreement to inflate the price, it is not showing how and for what purpose.*” This submission overlooks the fact that the parties entered into a new second contract based on the 2014 pro-forma invoice, after the bank stopped funding the purchase of the remaining goods. It was not a question of inflating the price. I therefore find no merit in the submissions of counsel for the defendant in that regard.

The authority cited by the defendant namely **Eslon Plastics (K) Ltd v National Water Conservation and Pipeline Corporation [2014] and National Bank of Kenya Ltd & Another, supra**, is distinguishable from the instant case in that in the instant case the parties have by their conduct written a contract for themselves.

In the premises, I find that the defendant is liable to the plaintiff for the three tractors (goods) supplied to it by the plaintiff. I therefore find that the applicable invoice is that of 2014, which set in motion the process of the second new contract. It is on that second contract the defendant took possession of the goods that are the subject of the instant suit.

## **Issue 2.**

In respect of this issue, the evidence of Edwin Too (Pw 1) is that the plaintiff installed the two linkages for the two tractors just as it did for the other third tractor. The defendant through Sivar Kumar Pinnamaraj (Dw 1), testified that the plaintiff did not install these linkages and that it cost them USD dollars 27,733.647 (which is the equivalent of Kshs 2,773,364.70 at the exchange rate of Kshs 100 to 1 USD dollar) to install these gadgets. Dw 1 did not produce any documentary proof to support his evidence that the defendant installed those gadgets. When asked under cross examination as to whether he had supporting documentary proof in support of his evidence, he replied that he had them but that he did not come with them to court during trial.

I saw and heard both Edwin Too (Pw 1) and Sivar Kumar Pinnamaraj (Dw 1) testify before me. Pw 1 struck me as a simple and truthful witness; while Dw 1 struck me as a very intelligent and incredible witness. I therefore find on the totality of the entire evidence adduced in court that the plaintiff installed the three linkages.

## **Issue 3.**

It is trite law that costs follow the event in terms of section 27 of the Civil Procedure Act (Cap 21) Laws of Kenya. I therefore find that the plaintiff as the successful party is entitled to the costs of the suit.

In the premises, I find that the plaintiff has succeeded in its claim against the defendant with the result that I hereby enter judgement judgement for the plaintiff in terms of its prayers as set out in the plaint.

Furthermore, I find that the defendant has failed to prove his claims in the counter-claim and I hereby dismiss all its prayers as set out in the defence.

Judgment signed, dated and delivered at **Narok** this 7<sup>th</sup> day of **May, 2020** in the absence of both counsel via posting through their E-mail addresses.

**J. M. BWONWONG'A.**

**J U D G E**

**07/05/2020.**