



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

MILIMANI LAW COURTS

HCCC NO. 256 OF 2015

BETA HEALTHCARE INTERNATIONAL LIMITED..... PLAINTIFF

VERSUS

GRACE MUMBI GITHAIGA DEFENDANT

JUDGMENT

1. Although commenced as a suit against three Defendants, the only Defendant now left is Grace Mumbi Githaiga after the suit against her initial co-defendants Joyce Njeri Marekia and Levnel Enterprises Limited was struck out in a decision of this Court delivered on 12th October 2019.
2. Beta Healthcare International Limited (Beta Healthcare) brings this suit against the Defendant on account of supply of pharmaceutical products in the sum of Kshs.52,216,505.48 made on diverse dates between May 2014 and October 2014. It is the case of Beta Healthcare that at the time of the supply the Defendant was trading in the name and style of Levnel Enterprises.
3. Beta Healthcare avers that while payment of the debt was pending, it learnt that the Defendant had turned her business name into a company by the name of Levnel Enterprises Limited, a fact that was not disclosed by the Defendant to Beta Healthcare.
4. Beta Healthcare sees fraud and misrepresentation on the part of the Defendant whose particulars are:-
 - a) The Defendant purported to be the sole proprietor of Levnel Enterprises with the aim of deceiving the Plaintiff.
 - b) The Defendant purported to be a sole proprietor of Levnel Enterprises knowing very well that she is a director to the 3rd Defendant with 2 other directors.
 - c) Not disclosing to the Plaintiff that Levnel Enterprises is a limited liability company incorporated on 15th October 2014.
 - d) continuously drawing cheques knowing very well that she had insufficient funds in the Bank.
5. In the Amended Plaint of 5th June 2017, the Plaintiff seeks for Judgment in the sum of Kshs.52,336,715.48, interest thereon at commercial rates until payment in full and costs of the suit.
6. The Defendant resists the case. In her statement of Defence dated 11th July 2017, she denies the claim and states that she enjoyed a credit limit of Kshs.5,000,000/= with Beta Healthcare and could never have incurred a debt of Kshs.52,216,605.48.
7. She further avers that although she was charged in two criminal cases being 1677 of 2015 and 2679 of 2015 for issuing bad cheques to the Plaintiff, the two cases had not been concluded at the time of the filing of Defence. She further states that some senior employees and members of staff of Beta Healthcare were involved in a fraudulent scheme in which they would cause goods to leave the Plaintiff's premises under the guise of delivering them to customers which was not the case.
8. In pursuit of that last line of Defence, the Defendant sought and obtained leave of this Court to take out third party proceedings against one Alice Mwalimo Mbori and Geoffrey M. Migiro. These are said to be the Head of Sales and Marketing and the General Manager – Finance respectively of Beta Healthcare. Although leave was granted, the Defence failed to serve the third party notices. This is not without some significance.

9. Evidence in the matter came from Hillary Langat for the Plaintiff and the Defendant spoke for herself. The three substantive issues to be discussed and determined are:-

- i. Did the Plaintiff supply the Defendant goods in the sum of Kshs.52,216,605.48 and is that sum owing,
- ii. Are any other parties liable to contribute to or indemnify the Defendant?
- iii. Is the Plaintiff entitled to interest at commercial rates?
- iv. What is the appropriate order as to costs?

10. At the time of giving testimony, Hillary Langat held the position of Finance Manager with Beta Healthcare. The highlights of his evidence can be given briefly. That as a customer, the Defendant applied for credit beginning with a limit of Kshs.15,000,000/= which eventually increased to Kshs.60,000,000/= (See P. Exhibit Pages 4, 5, 6, 7, 8 and 9).

11. He also produced various sales order and delivery notes as evidence of goods delivered by the Plaintiff's company to the Defendant. Sales orders are found on pages 12, 16, 17, 18, 19, 20, 21, 22, 23, 24, 45, 49 of the Plaintiff's Bundle and copies of delivery notes on pages 13, 25, 26, 27, 28, 29, 30, 31, 32, 33, 46 and 50.

12. His testimony was that once goods were received by the Defendant then an invoice was raised for payment of the goods to be made within 30 days from the date of delivery (See invoices – P. Exhibit Pages 10b, 14, 34, 35, 36, 43, 47, 51, 52 and 53).

13. His testimony is that as at 15th December 2014, the Defendant owed the Plaintiff a sum of Kshs.52,216,505.48 for which she issued 80 Cheques which were all returned unpaid (P. Exhibit Pages 61-135). Upon some cheques returning unpaid, the Beta Healthcare wrote to the Defendant in a letter addressed to the Managing Director Levnel Enterprises Limited (P. Exhibit Page 136) and that on the same date, 9th March 2015, the Defendant made a proposal on a rescheduled payment (P. Exhibit Page 137).

14. The Defendant on the other hand testified that the credited limit was only to the sum of Kshs.5,000,000/=

15. She told Court that she was shown orders dated 20th June 2014 and 18th August 2014 for Kshs.10,007,716/= and Kshs.40,001,529/= respectively which were falsified as no goods for that value were supplied to her. She stated that senior employees of Beta Healthcare namely Alice, Ravindra and Migiro later confessed to her that they had, without her knowledge, obtained goods from the company under the pretext that it was to her. That they stated that the products were supplied to a certain Congolese businessman who had delayed in paying her. So as to ward off pressure from the company, the three requested her to issue the postdated cheques and she did. In her oral testimony, she said that she wrote the letter of 9th March 2015 in similarly circumstances.

16. This Court perceives this to be a straight forward matter because the outcome will turn on whose version the Court believes regarding circumstances around which the Defendant wrote the letter of 9th March 2015. In its entirety the letter reads:-

Beta Healthcare,

NAIROBI

I Grace Mumbi Githaiga of ID 24650963 and a sole proprietor of Levnel Enterprises hereby agree that I will be away out of my business for the month of March out of personal matters, I hereby agree to be paying at least two hundred thousand a week (200,000) per every week till am back on April 2015. Then on April 2015 when I return I commit myself to be paying seven hundred thousand a week or more.

In May 2015 am willing to increase the amount per week from Kshs. 700,000 based on a meeting we will have on 2nd of May.

Signed on this day 9/3/2015 by Grace Mumbi

In the presence of Richard Kariuki

9/3/2015

17. The letter is all important because it is an admission of indebtedness by the Defendant to Beta Healthcare as at 9th March 2015. Beta Healthcare's version is that it was a response to its demand of 9th March 2015 in which the amount said to be outstanding is Kshs.52,647,360/=. The letter has a stamp dated 9th March of Levnel Enterprises and on it is the following handwritten words;

“Acknowledged and received”.

Below the words is a signature which appears to resemble that of the Defendant found in the admission.

18. In her testimony in respect to her letter, the Defendant stated:-

“I was asked to write this letter, Migiro & Alice did so to cover their transaction. I was forced. The two requested to save their jobs. It was a request”.

19. In the application to join Alice and Migiro as third parties, the Defendant deposes as follows in respect to the letter:-

“That having dealt with the trio over a period of time, I issued them with cheques and even upon their request went beyond to write a commitment to pay based on the trio’s concrete promise and the positions they held at the Plaintiff’s”.

20. Amongst the trio is Alice and Migiro.

21. The Defendant was blaming the two for the letter and it has to be asked why the Defendant failed to serve the 3rd Party notice on the two even after obtaining leave of Court. No good explanation was given and the inference to be drawn is that the Defendant was not keen on having the two state their version of things.

22. This Court believes the Plaintiff’s version and concludes that the Defendant was indebted to the Plaintiff in the sum of Kshs.52,647,360 as at 9th March 2015. There is no evidence that the sum has been paid. To be noted however, is that the Plaintiff’s claim is for Kshs.52,361,705.48. This is less than the sum demanded for.

23. The discrepancy is not fully explained. However, in Paragraph 30 of the statement of Mr. Langat, he states:-

“There is evidence of the Bank charges of Kshs.145,200.00 (See P. Exhibit Pages 56 and 60(1)).”

24. In the end the Court finds for the Plaintiff for the sum of Kshs.52,361,705.48 as claimed in the amended pleadings.

25. Beta Healthcare sought interest on the principle sum at commercial rates. This Court has looked at the credit limit, the sales order, delivery notes and invoices and does not see provision for imposition of interest at commercial rates in the event of late payment and the Court will not grant it.

26. Ultimately Judgment is entered for the Plaintiff against the Defendant for Kshs.52,361,705.48, interest thereon at Court rates from the date of filing suit. The Plaintiff will also have costs of the suit plus interest.

Dated, Signed and Delivered in Court at Nairobi this 13th Day of July 2020

F. TUIYOTT

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 17th April 2020, this Judgment has been delivered to the parties through virtual platform.

F. TUIYOTT

JUDGE

PRESENT:

Ms Musoga holding brief for Makhanu for the Plaintiff.

No appearance for the Defendant.