



REPUBLIC OF KENYA

IN THE HIGH OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 352 OF 2012

FTG HOLLAND.....PLANTIFF

VERSUS

AFAPACK ENTERPRISES LIMITED.....1ST DEFENDANT

AFA CHEMICAL LIMITED.....2ND DEFENDANT

JUDGEMENT

1. The Plaintiff commenced this suit vide a plaint dated 10th May 2012, seeking for judgement against the Defendants for:

- a. Euros 314, 660.20. being the outstanding debt owed by the defendants to the plaintiff on unpaid invoices;
- b. costs of the suit;
- c. Interest on (a) and (b) above at courts rates until payment in full.

2. The Plaintiff carries on business of manufacturing flower transporting Gel (herein “FTG2”), a water- based gel that is used as a substitute for water during transportation or presentation in; flower shops and or Kiosks. The Plaintiff has appointed Resellers of FTG in Africa and all over the world.

3. On or about March 2004, the Plaintiff appointed the Defendants to be its resellers of FTG in Africa. In the years; 2004 to 2011, the Plaintiff supplied the Defendants with FTG as well as; assorted farm chemicals and equipment, and issued invoices to be settled on receipt of the said goods.

4. That, on various dates; between 14th November 2004 and 28th February 2005, the 1st Defendant was issued with four (4) invoices totalling a sum of; Euros 53, 756.09, which have not been settled to date. The 2nd Defendant was equally issued with twenty-eight (28) invoices in the sum of; Euros 397, 904.11, which also remain unsettled to date. Thus, since November 2004 to 17th April 2011, thirty two (32) invoices have been issued amounting in total of Euros 451,660.20.

5. In the meantime, during the corresponding period, the Plaintiff has received payment through its bank totalling Euros 137,000 only, leaving an outstanding amount of; Euros 314,660.20, claimed herein.

6. By a letter dated 2nd November 2011, the Plaintiff’s Advocates wrote to the Defendants, demanding payment of the outstanding monies but the Defendants have refused, neglected and or failed to honour the demand.

7. However, the Defendants filed a joint response and counter claim dated 19th July 2012, denying all the allegations in the plaint, in particular that the Plaintiff manufactures “FTG”, and/or appointed them as Resellers in Africa, but admitted that, the Plaintiff supplied the 2nd Defendant with farm chemicals and assorted equipment.

8. That the claim in relation to all invoices raised prior to 31st May 2006, and time barred and they will raise a preliminary objection based on Limitation of Action Act. In addition, the Defendant pleaded in the counter claim that; they met the Plaintiff’s director one; Hans Vonk through a mutual friend.

9. As a result of the said meeting, the Defendants learnt of the Plaintiff's business of; manufacturing assorted farm chemicals and equipment and the Defendants decided to engage in trade therein on a consignment basis.

10. The agreement was that, the plaintiff was to consign the goods to Kenya, pay all Government taxes and duty and deliver the goods to the Defendant's premises. Further, the initial few consignments were on trial basis and the Defendant would only remit payment on successful sales. The 2nd Defendant avers in the year 2006, the Plaintiff acted contrary to the terms of the agreement and declined to pay the Government dues and transport expenses.

11. That, the Plaintiff shipped the assorted farm chemicals and equipment between 19th August 2008 and 16th March 2011, and was paid by the 2nd Defendant a sum of Euros 105,268.5. Following successful sales and a cordial relationship, the parties agreed that, the 2nd Defendant would make ad hoc payments for future consignment.

12. Similarly, the 2nd Defendant advanced soft loans to the Plaintiff's director and/or his agents while in Kenya, and agreed that it would be credited to the 2nd Defendant's trade account.

13. The 2nd Defendant averred that, it paid the Plaintiff a sum of; Euros 129, 000 through telex transfers and Euros 96, 000 in cash with an over payment of; Euros 118,737.50. However, since delivery of the last consignment in March 2011, the Plaintiff has declined to make further deliveries despite excess payment, thereby breaching the contract.

14. The 2nd Defendant prays for judgment against the Plaintiff: -

- a. Dismissal of the plaintiff's entire claim;
- b. Allow the 2nd Defendant's counter claim in terms of; Euros 118.731.5;
- c. Costs of the suit;
- d. Interest on (a) and (c) above
- e. Any other relief the court may deem fit to grant.
- f. with costs to the defendant in the counter claim. For a sum of 0plus costs.

19. The Plaintiff filed a response to the defence and defence to the counter claim and reiterated the contents of the plaint, but noting that the Defendant had under paragraph 5 of the defence and counter claim admitted the Plaintiff's claim.

20. The Plaintiff conceded that, the first consignment was to be on trial basis but denied that, the payments were based on product market performance in the market. The Plaintiff insisted the agreement was based on Free on-Board basis as per Ico terms. This meant that the shipment is delivered by the Plaintiff to the port of export and all further costs including delivery and collection is charged on the Defendant.

21. The plaintiff advances the alleged soft loans either directly and or through his agents in Nairobi and/or the claim of over payment. That further supply could not continue due to the Defendants' indebtedness.

22. The case proceeded to a full hearing. The Plaintiff's witness; Andreas Nuijten, relied on his witness statement dated 3rd June, 2019 and a bundle of documents dated 3rd May 2018 and 3rd June, 2019, which he adopted as evidence in the matter. The Defendants did not adduce any evidence in Court during the hearing. The Advocate on record informed the court that, he had filed an application to cease acting. It had not been prosecuted. However, when the hearing started he was in court but walked out as the same proceeded.

23. I have considered the entire evidence in the matter and I note that, the Plaintiff filed a list of 16 issues for determination dated 18th February 2014. I shall not reproduce them herein but will consider the same alongside all the other issues. However, in my considered opinion, the issues that have arisen for determination are: -

- a. Whether the parties herein entered into contract and if so, what were the terms and conditions of their engagement;
- d. Did each party perform its contractual obligation; if not, which party breached the contract;
- c. Has each party proved its claim; and
- d. Who will bear the costs of the suit?

24. However, before I deal with the subject issues, it is noteworthy that the Defendants having failed to attend court for the hearing of the case and formally present their evidence and allow the Plaintiff test it on cross examination, that evidence is inadmissible and therefore, as it were, the Plaintiff's case is unopposed.

25. Be that as it were, I have considered the pleadings and I find that, there is no dispute that the parties herein engaged in a relationship

whereby the Plaintiff supplied the Defendants with FTG and farm chemicals as stated herein. This is supported by the documents and/or correspondence between the parties and by their pleadings. The main issue is; which party was to pay for the taxes and other expenses associated with; clearing and delivery of goods from the port of Mombasa to Defendant's premises in Nairobi.

26. The other issue is whether the Plaintiff delivered the goods, invoiced for the same and was or was not paid, and finally whether friendly and soft loans were advanced to the payment and/or whether, the Defendant over paid the Plaintiff.

27. In proof of its claim, the plaintiff has produced several documents comprising mainly of; invoices for the years; 2004 to 2011, airway bills, bank statements, correspondence between the parties and other documents for import and delivery of goods. These documents were filed along the plaint and run into over 340 pages.

28. These documents and in particular, the invoices required a breakdown in an understandable manner as; to which invoices were issued in relation to which consignment, and which ones are settled and which ones are not. It is the responsibility of a Plaintiff to prove its case and the Defendant to test the veracity of that evidence. The court does not descend into the arena of litigation.

29. Be that as it were and doing the best I could, I established from the invoices produced the following: -

- a. Invoices for the year 2004----- Euros 35,121.70;
- b. Invoices for the year 2005-----Euros 58,990.28
- c. Invoices for the year 2006-----Euros 45,338.51
- d. Invoices for the year 2007-----Euros 125,938.67
- e. Invoices for the year 2008-----Euros 65, 349.10
- f. Invoices for the year 2009-----Euros 78,588.48
- g. Invoices for the year 2010-----Euros 76,178.99
- h. Invoices for the year 2010-----Euros 43,209.36

Total amount of invoices-----Euros 488,848.35

30. The bank statements produced show various payments made. As stated, the Defendant has not rebutted the Plaintiff's case and in the given circumstances the court has no valid reason to cast aspiration or doubt on the Plaintiff's evidence. In the same vein, the issues raised by the Defendants including; time barred invoices, overpayment and/or soft loans are not canvassed or supported by evidence.

31. The upshot is that, I enter judgment for the Plaintiff as prayed for in the plaint and dismiss the Defendants' counter claim with costs to the Plaintiff. The interest at court's rate on the amount awarded shall accrue from the date of judgment until payment in full.

32. It is so ordered.

Dated, delivered and signed this 13th day of July 2020.

GRACE L NZIOKA

JUDGE

In the presence of;

Mr. Mwangi for the plaintiff

No appearance for the defendant

Robert -----Court Assistant

Delivered via virtual communication