



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 663 OF 2012

AEXCEL AUTO SPARES LIMITEDPLAINTIFF

VERSUS

SIYAMA COMPANY LIMITED DEFENDANT

J U D G M E N T

1. **AEXCEL AUTO SPARES LIMITED**, the Plaintiff, is a Limited Liability Company registered under the Companies Act Cap 486. The Plaintiff is in the business of supply of motor vehicle spare parts.

2. The Defendant, **SIYAMA COMPANY LIMITED**, is a Limited Liability Company registered under the Companies Act Cap 486. At all the material time, the Defendant was a customer of the Plaintiff. The Defendant purchased, on credit, spare parts from the Plaintiff. This claim relates to these business transactions.

PRELIMINARY

3. The Defendant failed to attend Court and therefore failed to adduce *viva voce* evidence at the trial. The Defendant was however represented, by Counsel, at the trial and Counsel cross-examined the Plaintiff's witness.

4. The Defendant having failed to adduce evidence in support of its defence herein means that that defence remains unsupported allegations and that is all. This Court will not therefore consider the Defendant's defence. This is what was stated in the case **SHANEEBAL LIMITED V COUNTY GOVERNMENT OF MACHAKOS [2018] eKLR** viz:

“In this matter, apart from filing its statement of defence the Defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st Plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations ... Sections 107 and 108 of the evidence act are clear that he who asserts or pleads must support the same by way of evidence.”

PLAINTIFF'S CASE

5. The evidence of the Plaintiff was adduced by Stephen Kabi. Kabi works for the Plaintiff as the Finance Manager. He stated that he was conversant with the facts of this case.

6. Kabi testified that the Defendant began to purchase from the Plaintiff spare parts in the year 2009. The Defendant's business was the resale of those spare parts. In the course of business, Kabi said that the Plaintiff and Defendant established a good relationship. Consequently, the Plaintiff permitted the Defendant to obtain spare parts on credit with a view to payment being made subsequently.

7. That relationship of trading on credit is supported by a credit application form, signed by the Defendant on 23rd February 2009. The Plaintiff approved the application to trade on credit up to the limit of Kshs. 2 million for 60/90 days at interest of 2% per annum.

8. Kabi presented in evidence in chief tables representing the Plaintiff and Defendant's trading. In total, the Plaintiff produced 19 tables reflecting the trading with the Defendant.

9. Those tables show the cash value of each transaction and whether or not the cheque payment was honoured. There is evidence, both in those tables and in the documents presented in evidence, that there were various instances the Defendant's cheques were dishonoured by the bank. There is also evidence of the Defendant providing replacement cheques when there was such dishonour.

10. Kabi in evidence stated that the Defendant would sometimes issue the Plaintiff with replacement cheques of third parties such as Wananchi Hauliers Limited, Muhsin Shariff and Moh'd S.S.T, amongst others.

11. The Plaintiff, through its witness Kabi, produced delivery notes, invoices and copies of the dishonoured cheques which documents support the Plaintiff's claim for the amount claimed, that is Kshs. 15,101,715.98.

12. The Plaintiff's claim, however, for interest on that amount at 35% per annum is not supported by any document. The credit application form, signed on behalf of the Defendant, shows that the interest rate for overdue amount would be 2% per annum. It follows that the Plaintiff's claim for interest of Kshs. 4,092,815.62 fails for lack of proof.

13. The Plaintiff has produced documents proving that it was charged by its bank Kshs. 46,500 in respect to the Defendant's cheques that were dishonoured.

14. Although the Defendant's Learned Counsel submitted that the Plaintiff had failed to prove its claim, I beg to differ. The Plaintiff, as stated above, well met the civil burden of proof as was discussed by Denning J in the case **MILLER V MINISTER OF PENSIONS (1947)** viz:

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: ‘We think it more probable than not’, the burden is discharged, but, if the probabilities are equal, it is not.

Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough.”

15. Also in response to the Defendant's Learned Counsel's submissions, I wish to state that the Plaintiff's evidence, led by Kabi, was uncontroverted by the Defendant who chose not to adduce evidence. It follows, that this Court finds for the Plaintiff, where the Plaintiff stated that the Defendant gave it cheques of third parties to replace the Defendant's cheques that had been dishonoured. The fact that there are cheques issued by third parties does not require the invocation of the principle of privity of contract in view of the Plaintiff's explanation which explanation was uncontroverted.

16. On the whole, the Plaintiff has succeeded in its claim and there being no reason not to, I do award the Plaintiff costs of the suit.

17. In the end, **I grant judgment for the Plaintiff** as follows:

- a) **Kshs. 15,1010,715.98 plus interest at the rate of 2% per annum from the date of filing this suit until payment in full;**
- b) **Kshs. 46,500 with interest at Court rate from the date of filing suit until payment in full.**
- c) **Costs of this suit.**

DATED, SIGNED and DELIVERED at **NAIROBI** this **8TH** day of **MAY**, 2019.

MARY KASANGO

JUDGE

Judgment Read and Delivered in Open Court in the presence of:

Sophie..... **COURT ASSISTANT**

..... **FOR THE PLAINTIFF**

.....**FOR THE DEFENDANT**