



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 429 OF 2016

SCHENKER (KENYA) LIMITED.....PLAINTIFF

-VERSUS-

VINE FRESH (EAST AFRICA) LIMITED.....DEFENDANT

RULING

Schenker (Kenya) Limited, the Plaintiff, is a Limited Liability Company incorporated under the Companies Act. Vine Fresh (East Africa) Limited is also incorporated under the companies Act.

1. The Plaintiff has sued the Defendant seeking judgment for USD93,899.16 and Kshs.705,882.08 with interest. This amount was incurred when in 2016 Defendant company contracted the Plaintiff to provide freight services for fresh agricultural shipment from Jomo Kenyatta International Airport, Nairobi, to various destinations. The Defendants, by its defence in this matter admitted that it did engage the Plaintiff for freight services.
2. Other than that admission the Defendant, through its defence denies the Plaintiff's claim, that the goods freighted reached their intended destination in a timely manner. The Defendant also denies the demand, by the Plaintiff, of settlement of the amount claimed was made.
3. Before Court, for ruling, is the Plaintiff's Notice of Motion application dated 18th August 2017. That application is brought under Order 13 Rule 2 of the Civil Procedure Rules. The Plaintiff, by that application, seeks for entry of judgment on admission for the amount claimed.
4. The admission the Plaintiff relies upon is in the correspondence between the parties Advocates, before filing of this suit. The Plaintiff's Learned Advocate Wonge Maina & Onsare Partners Advocates wrote a demand letter to the Defendant dated 5th July 2016. That letter was responded to by the Learned Advocates S. Ndungu & Company Advocates by their letter of 19th July 2016. It is important to reproduce that letter by S. Ndungu & Company Advocates as follows:

“OUR REF: SDC/COMM/2016

YOUR REF:WMO/REC/023/2016/DBS

19th July 2016

Maina & Onsare Partners Advocates

Hurlingham Park, Suite B1

Argwings Kodhek road

P.O Box 35255 – 00100

NAIROBI

RE: DEMAND FOR USD93,899.16 AND KSHS.705,882.08 OUR CLIENT: VINE FRESH (E.A) LIMITED

The above matter refers.

We act for our above client, VINE FRESH (E.A) LIMITED, which has forwarded to us your demand letter dated 5th July 2016 with instructions to address you as follows:

- a) That our client admits receiving the above freight services from yours and the resultant claim of USD93,899.16 and Kshs.705,882.08 respectively.
- b) That as your client is aware, our client has made significant strides towards liquidating the amount due to yours – through payments – from an initial aggregate sum of over Kshs.13,000,000 to the present amount.
- c) That our client remains ready and willing to settle the balance as particularized in your above letter but is unable to pay the whole amount within the demand periods on account of fluctuations in its business.
- d) That our client has on several occasions explained its above predicament to your client and reiterated its desire to settle the balance in agreed flexible installments.
- e) That the above notwithstanding, our client is not liable to settle your collection charges for both the USD and Kshs. account as claimed.

In view of the above, our client has instructed us to address you on its payment proposal for the said sum of USD93,899.16 and Kshs.705,882.08 respectively as follows:

- i. Kshs.350,000 to be paid immediately upon acceptance of this offer;
- ii. Kshs.355,882.08 to be within 14 days of the above initial payment.
- iii. The balance with respect to the USD account to be liquidated in monthly installments equivalent to Kshs.400,000 payable from 31st August 2016; and
- iv. That if acceptable to you and your client, the above proposal be reduced to a compromise and settlement agreement to be executed between your client and ours and to cover – among others-timelines for payment and remedies for breach.

We opine that the above proposal by our client is most reasonable and we urge your client to consider and accept same to avoid protracted litigation on this matter with all the attendant costs and other consequences.

We await your prompt response.

Yours faithfully,

S.NDUNG’U & CO. ADVOCATES

SAMUEL NDUNG’U

Client”

5. The above letter was not written on without prejudice basis, as it can be seen.

6. The Plaintiffs learned Advocate on receiving the above letter wrote and made counter proposal on the repayment plan. The Defendant’s Learned Advocate responded to that letter by his dated 16th August 2016 which again I will reproduce here.

“OUR REF: SDC/COMM/2016

YOUR REF: WMO/REC/023/2016/DBS

16th July 2016

Maina & Onsare Partners Advocates

Hurlingham Park, Suite B1

Argwings Kodhek road

P.O Box 35255 – 00100

NAIROBI

RE: DEMAND FOR USD93,899.16 AND KSHS.705,882.08 OUR CLIENT: VINE FRESH (E.A) LIMITED

We refer to the above and your letter dated 22nd July 2016 and 3rd August 2016, whose contents we have noted.

We apologize for delay in reverting. We were awaiting our client's further instructions.

We forward herewith our client's counter-proposal as follows:

- a) That with respect to the Kshs. Account, our client proposes to pay the sum of Kshs. 350,000 on or before 31st August 2016.
- b) That the balance of Kshs.355, 899.16 shall be paid within 14 days of the initial payment;
- c) That for the USD Account, our client proposes to liquidate the same in monthly installments of Kshs. 400,000 till 31st December 2016 and thereafter settle the balance in consecutive monthly installments of Kshs. 800,000 effective January 2017 until payment in full.
- d) That we opine that listing of our client with CRB is counter-reproductive at this point and will only serve to impede our client's much needed access to financing and by extension impair its ability to settle the debt herein. We therefore urge yours to desist from such drastic measures as ours makes endeavors to clear the amounts due.

We have advise ours to channel all future payments through the account details provided in your demand letter dated 22nd July 2016.

We look forward to your positive response.

Yours faithfully

S.NDUNG'U & CO. ADVOCATES

SAMUEL NDUNG'U

CC: Client"

7. The Defendant has opposed the application on the basis that the claim is disputed by it and that the Plaintiff's claim needs to be canvassed at trial.

ANALYSIS AND DETERMINATION

8. I have considered the pleading and the affidavit evidence. Having done so I find that the amount claimed by the Plaintiff; That it was unequivocally admitted as owing by the Defendant by correspondence before the filing of the suit. Not only was it admitted but proposals were made on behalf of the Defendant, on the settlement of that amount. In view of the above I would ask, what then would go for trial. There is nothing in the defence that needs to be ventilated at the trial.

9. This is an application for judgment on admission. In the case **CHOTRAM VS NAZARI (1984) KLR327**: the decision thereof which still rings true even though it is a case that was decided along time ago the Court held it was held:

"Admissions have to be plain and obvious, as plain as a pikestaff and clearly readable because they must result in judgment being entered. They must be obvious on the face of them without requiring a magnifying glass to ascertain their meaning. Much depends on the language used. The admission must have no room for doubt that the parties passed out of the stage of negotiations onto a definite contract."

10. That case was applied in the case: **MERCY KARIMI NJERU & ANOTHER V KISIMA REAL ESTATE LIMITED (2015) eKLR** by the Court of Appeal – thus:

"In Harit Sheth T/A Harit Sheth Advocates vs shamas Charania (Supra) the Court observed thus:

"For the respondent to be entitled to judgment on admission, the admission too had to be plain and clear."

11. The examination of the affidavit evidence, as reproduced above shows that the admission of the Defendant, with regard to the Plaintiff's debt, was plain and obvious. It is admission which can result in judgment being entered. The defence filed has bear denials which does not raise triable issues.

12. I am also persuaded by a relevant decision of Supreme Court of Papua NewGuinea that is: **AMPAOI V TAURIKO (1212) PGSC 3; SC1166 (1 MARCH 2012)** viz:

“In Imawe Bogasi Land Group Inc-v-Bank South Pacific and Roale Hongiri ILG & Ors (2011) SC 1102, the Supreme Court further clarified the confusion and emphasized that,”..... admissions may be based either on formal admissions in the pleadings or on informal admissions. For judgment to be entered under this rule, the respondents’ admissions must be strong and unambiguous. Judgment will not be entered on admissions where serious questions of fact or law require consideration.”

13. This is a suitable case where judgment should be entered on admissions. The Plaintiffs Notice of Motion is merited. Having succeeded in the application the Plaintiff is entitled to the costs thereof.

14. In the end the orders of the Court are:

a) Judgment is hereby entered for the Plaintiff against the Defendant, an admission, as prayed in the plaint.

b) The Plaintiff is awarded costs of the Notice of Motion dated 18th August 2017.

DATED, SIGNED and DELIVERED at NAIROBI this 22ND day of MAY, 2019.

MARY KASANGO

JUDGE

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

Sophie.....COURT ASSISTANT

.....FOR THE PLAINTIFF

.....FOR THE DEFENDANT