



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL, ADMIRALTY AND TAX DIVISION

CIVIL SUIT NO. 286 OF 2012

BELFAST MILLERS.....PLAINTIFF

VERSUS

RUARAKA DUCKS LTD.....DEFENDANT

JUDGMENT

1. The Plaintiff commenced the suit herein by filing a Plaint dated 26th November 2010, seeking for Judgment against the Defendant in the sum of Kshs 1,072.00 plus costs of the suit and interest thereon. It is the Plaintiff's case that, on diverse dates between June and July 2010, it supplied duck feeds to the Defendant, which were duly received.
2. Subsequently the relevant invoices for the total sum claimed herein were issued for payment. However, upon demand for payment, the Defendant declined to pay on the ground that the feeds were not of merchantable quality. As a result, the Plaintiff filed the suit to recover the sum claimed.
3. However, the Defendant filed a statement of Defence and a counter claim dated 20th March 2011 and generally admitted that, the Plaintiff supplied the duck feeds in the sum of Kshs 1,072.00 as claimed.
4. However, the payment was not made in that, from mid 2008, to the time of filing of the suit, the Defendant expressed doubts as to the merchantability of the feeds supplied, as a result discussions were held by the representatives of the parties with a view to address the problem cordially but no agreement was reached.
5. The Defendant pleaded that it suffered significant loss occasioned by the feeds supplied, in that, there was poor egg formation, drop in egg production, poor health of the commercial flock, low weight gain in the ducks and higher mortality in the flock. This affected its cash flow.
6. It was argued that the Plaintiff knew that the Defendant was engaged in the business of rearing ducks for the purpose of meat production. However during the period in issue, the Plaintiff supplied duck feeds which were not of the agreed specifications or the quality required for rearing ducks, which was in breach of the contract between the parties.
7. The Defendant filed a counter claim for damages, the loss suffered in the total sum of Kshs 7,714,804.00; being the losses suffered and assessed during the period of the years 2007 to 2008, in the sum of Kshs 3,503,198.00, production shortfall for the year 2008 to 2009 in the sum of Kshs 1,335,600.00 and the losses for the year 2010 in the sum of Kshs 2,872,815.00. The Defendant also prays for costs and interest.
8. Upon filing of the statement of Defence, the Plaintiff filed reply to the Defence and Defence to the counter-claim dated 1st April 2011 and denied the alleged and/or the alleged meeting between the parties to resolve the dispute amicably. It was averred that, the feeds supplied between the periods of 2008 to 2010, was of good quality and standards as per the market specifications. The Plaintiff denied that, there was a contract between the parties as to any specification of the feeds or at all. As such there was no breach of any contractual terms as alleged, and neither did the feeds occasion the loss in the sum of Kshs 7,714,804.00.
9. Subsequently, the Plaintiff filed a notice of motion application dated 27th April 2011 seeking for Judgment on admission in the sum of Kshs. 1,072,000.00 together with costs and the striking out of the counter claim. Apparently, the matter had been filed in the Chief Magistrates' Court. The Chief Magistrate Honourable Boaz Olao (as he then was), considered the application and transferred the matter to the High Court, due to lack of pecuniary jurisdiction due to the sum claimed in the counter claim.
10. Be that as it were, the suit proceeded to a full hearing. The Plaintiff's case was supported by the evidence of PW1 Rajesh Derchano Shah, the director and shareholder of the company. He relied on the witness statement he filed in court dated 1st April 2011 and relied on the list of documents filed. He reiterated that, the Plaintiff supplied the Defendant with duck feeds from the year 2006 to 2011 when the

relationship ended.

11. That the Defendant used to order for the feeds and the Plaintiff would deliver and invoice for the same, and although the delivery notes and invoices amounts to Kshs 1,138,400.00, the sum was reduced to a sum of Kshs 1,072,000.00 upon recalculation and discovery of an error. He refuted the claim that goods were not merchantable and argued that, the Plaintiff has supplied feeds to other entities and without any complaints. That even the Defendant did not lodge a formal complaint, but complained verbally. The witness further testified that, on several occasions, the Defendant's premises was visited and observed the ducks were doing poorly and the feeds were poorly stored in store and improperly ventilated environment. Finally, Mr. Shah testified that, among the factors that could have affected the ducks was lack of vaccination regime, domestic disinfection used was not proper, climatic conditions and diseases.

12. As regards the counter claim, it was argued that the several reports produced, were based on samples collected from the Defendant's premises, and that no samples were collected from the Plaintiff's premises, therefore it cannot be concluded with certainty that, the samples tested were from the Plaintiff's supply, as there are six (6) to seven (7) companies that manufacture duck feeds. It was further argued that, the reports produced are not accurate, as they give approximate results and have nothing to show the feeds supplied by the Plaintiff were not of merchantable quality.

13. The witness testified that, Shilah Taylor from the Defendant's company complained on several occasions, of deficiencies in the feeds; due to lack of minerals and that, the ducks were not growing well and there was high mortality rate. The parties met and Dr. Sanju recommended additional selenium ultamus be added to the feeds and it was added. There was a sharp drop in mortality rate and improvement in growth, but Mr. Shah argued that, it did not mean the feeds were deficient in any way. Further the Defendant returned several batches of feeds, and they were supplied with replacement, but the witness argued that the replacement was done to simply satisfy the customer.

14. The Defendant's case was supported by the evidence of; Shila Emily Taylor, who adopted her witness statement dated 20th March 2011. In a nutshell, she stated that the Defendant's company deals in the business of rearing poultry ducks. The Plaintiff's company has been supplying duck feeds to the company and in particular for the period from August 2006 to July 2010.

15. That the Defendant vide a letter dated 30th June 2006, gave the Plaintiff the specification of the feeds and the Plaintiff was supposed to manufacture the feeds in accordance with the Cherry valley specifications for a particular duck. However, the Plaintiff breached the agreement and the specifications, in that upon the use of the feeds, the ducks stopped producing enough eggs. The Defendant suspected that the feeds contained aflatoxin.

16. That the feeds were subjected to examination and Dr. Daniel Mungai found that, the feeds required Selenium and the results were communicated to the Plaintiff and Mr. Raj agreed to correct the level of the Selenium. Further samples of the feeds were taken to KARI and Analabs for the tests. The results revealed deficiencies in the feeds. As a result, the ducks were given more calcium and there was improvement though for a limited period before the problem recurred in the year 2010, when the egg production reduced again and the ducks started staggering.

17. The witness told the court that, further tests were done at Kenya Bureau of Standards (KEBS) and BNA Biotech and all the results received suggested that there was something wrong with the feeds supplied with the Plaintiff. The witness strongly refuted the Plaintiff's evidence the feed were poorly stored and that she was vaccinating the ducks at the premises and stated that, there were disinfectants as recommended and that the Defendant followed the correct procedure in the rearing of the ducks. She also denied the allegations that, the Defendant could have sourced the feeds from a different supplier and insisted that, the feeds had to be supplied specifically for the high breed and the only one firm supplied the feeds in 1996.

18. That as a result of the low egg production, the Defendant's company suffered loss as pleaded in the counter-claim. She produced records to show that, the Defendant's business had good turn-over before the problem in question. Finally, the Defendant maintained that, it did not pay the Plaintiff as the Plaintiff supplied substandard feeds.

19. During cross-examination, the witness told the court that, the parties had a verbal agreement on the specification of the feeds to be supplied. Further she conceded that, although the company kept daily records of egg production, weekly records of hatchery, the same were not available in court; as they "run into mountains". She also conceded that, the audited sales records were not in court.

20. In further cross-examination, the witness stated that, when the samples for testing were taken to various experts for examination, the Defendant did not inform the Plaintiff; but shared the results of the examination with the Plaintiff.

21. In re-examination, she stated that, Mr. Shah from the Plaintiff's company acknowledged the specifications sent to the Plaintiff for the manufacture of the feeds vide an email which is not in court. She maintained that the records produced herein are audited. Finally, she argued that, she did not file her claim initially as the parties were negotiating the settlement and she was waiting for the production period to know the degree of damage. She testified that, the Defendant Company is the only company in East and Central Africa that, that deals in duck farming and only got the feeds from the Plaintiff.

22. The Defendant further called Dr. Daniel Mungai Kibe a veterinary surgeon, who testified that, in the year 2008, he visited the Defendant's company on the complaint that, there was low egg production in the duck farming. He noticed that, the eggs were of different sizes, which was abnormal. The shells were poorly formed and bumpy and high mortality in commercials. That it was an indication of lack of calcium. That he also noticed that some ducks were staggering, others had bent necks, as a result he did a post-mortem examination on the ducks and found aflatoxin causes, indication of toxic in the feeds. He prepared a report to that effect dated 8th July 2012. However, he recommended that, further tests be carried out to confirm presence of the toxic.

23. During cross-examination, the witness stated that he carried out the post-mortem exercise on the farm as he does not have a laboratory. He also conceded that, his report does not show the period of the post mortem on the ten ducklings he dealt with and neither did he take the

photos of the ducks examined.

24. The Defendant further called Anthony Irungu Mwangi a lab analyst at KBS, who testified that, he carried out laboratory tests on poultry feeds and established that, there was aflatoxin. However, he conceded in cross-examination that, he found the samples in the laboratory having been brought by another employee of KBS, but indicated the client as Ruaraka Ducks. The Defence witness, Joseph Kimani Kelu told the court that, he drafted the letter dated 19th July 2010 forwarding the results of the findings of examination conducted by Anthony Irungu.

25. Mr. Danson Lughonje, an employee of the Defendant testified that, he worked at the Hatchery at the Defendant's farm. That, on 15th August 2008, the company changed the feeds from breeder to layers and there was a problem, as the chicks were not growing and could not walk. The feeds were supplied by the Plaintiff's company.

26. Finally Mr. Stephen Mutisya testified that he worked with the Defendant's company from 1st July 2007 to November 2013, and was in charge of daily records of egg production. That in the period of 2008 to 2011 he realised the number of eggs had decreased. However, during cross-examination he agreed that, he did not have the records before the period of July 2008 for comparison and although he had a record of unfertilised eggs, he did not have it in court. That the feeds were then sourced from Unga feeds company and the egg production went up and the birds did not die.

27. At the close of the entire case, the parties sought for time to file their final submissions. The Plaintiff filed its submissions dated 3rd April 2018. However, the Defendants did not file any submissions, instead the Defendants filed an application seeking to be allowed to reopen the case and call more witnesses. Even then, the Defendant did not take any steps to prosecute the application.

28. I have considered the Plaintiff's submission alongside the evidence adduced, and find the following issues having arisen for consideration: -

a) *Did the defendant and the plaintiff enter into any agreement for sale of specified duck feeds?*

b) *If the answer to (a) above is affirmative, then what were the terms and conditions of the agreement, in relation to the specification of the feeds to be supplied.*

c) *Did the plaintiff supply the feeds as per the specifications (if any)?*

d) *If the answer to (c) is in the affirmative, then has the plaintiff been paid for the feeds supplied?*

e) *If the answer to (c) is in the negative, did the defendant suffer any loss as a result of the feeds supplied?*

f) *If the Defendant suffered loss, has the claim for special damages been proved and/or,*

g) *Is any of the parties entitled to prayers sought, and*

h) *Who will bear the costs?*

27. I have considered the evidence adduced as supported by the documents produced and I find that, the Plaintiff supplied the Defendants with duck feeds during the period of August 2006 to July 2010. There was no problem with the feeds supplied from August 2006 to July 2008. However according to the Plaintiff's witness thereafter, she noticed the challenges stated herein and strongly attributed the same to deficiency in the feeds and in particular aflatoxin therein, which the Defendant has vehemently denied.

28. The issue is whether the Defendant gave the specifications of the feeds and whether the Plaintiff adhered thereto. It suffices to note that there was no formal agreement on specifications of the feeds to be supplied. However, Sheilah Taylor for the Defendant testified that the Plaintiff was notified of the specifications vide a letter dated 30th June 2006. I have considered the letter addressed to Mr. Shah, Belfast Millers, and note that it states inter alia:

"Herewith the formula for the three different types of feeds we use. Please note that coccidiostats are harmful to ducks and lysine is specifically important in the breeder flock to ensure healthy egg formation. Please let us know what you would price each feed at."

29. However it is not clear whether this letter was received and acknowledged, although it is alleged that Mr. Shah responded thereto vide an email but it was not produced in court. As such, the court has not had the benefit of the response. I also note that, the Defendant produced a Nutrition Management Manual by Cherry Valley described as "serving the duck industries in the world." It is also not clear whether the said manual was ever brought to the knowledge of the Plaintiff. Therefore it can be conclusively held that the parties expressly agreed on the specifications of the subject feeds.

30. Be that as it were, the question remains whether proper feeds were supplied and/or whether indeed, it was the deficiency in the feeds that caused the challenges the ducks experienced of inter alia; decrease in egg collection and/or the staggering of the chicks. The Defendant has adduced evidence through several witnesses to prove that there was deficiency in the feeds. In that regard, Dr. Mungai produced a report dated 8th June 2010, which states that there was indication of calcium deficiency in the feeds and recommended supplements. As stated herein he recommended further laboratory analysis/examination of the feeds. (see page 16 of the defendants documents) However, he concluded that the above post mortem findings are consistent with those of acute aflatoxicosis. However laboratory feed analysis (of the suspect feed) should be done to confirm and determine the aflatoxin levels in the feed.

31. The feeds are said to have been forwarded to the Kenya Bureau of Standards where they were examined by Anthony Irungu Mwangi and found to contain aflatoxin, and the report to that effect signed by Joseph Kimari Keeru.

32. From the report, The report is found at page 19 of Defendant's documents. I find that; the poultry feeds were allegedly drawn from the Defendant's farm on 15th February 2010. This was a period of one year and four months after the alleged problem of low egg production was detected in the year 2008 and after the examination carried out by Dr. Mungai and recommendation further laboratory tests on the feeds. In fact, although Dr Mungai's report is dated 8th July 2010, he testified that he carried out the examination on the 10 dead ducklings in the year 2008. Similarly the Bacteriology laboratory report at pages 6-7 of Defendant's documents and which was not produced states that Pekin duck SM2- commercials were received on 2nd September 2008, and tested the same date.

33. Be that as it were, several issues arise: Firstly, the samples that were taken to KBS were taken from the Defendant's and not the Plaintiff's premises. Secondly, the plaintiff was not notified of the drawing of the sample, and was therefore not part of the same, so as to confirm that the feeds that were subjected to the forensic analysis were beyond doubt, those supplied by the Plaintiff. Thirdly, the witness who examined the same told the court that, he received the samples from another employee of Kenya Bureau of Standards, that employee identified as "Caro" was not called to testify. See technical report by Karokor Kodii not called as witness (page 8). Therefore it was not in vain, that the Plaintiff argues that, the feeds tested did not come from its company. It would have been in order to examine feeds found both by the Defendant's and Plaintiff's premises.

34. Even more so, if the Defendants kept records of feeds supplied by the Plaintiff, the production thereof at the time of taking the sample and/or matching of the sample to the records and/or the batch number would be indicative that the sample extracted were taken from the bulky supplied. Indeed, the evidence of the witness who extracted the sample was critical. That link is missing. As a result it is not conclusive, that the sample of the feeds extracted and tested was from the bulk supplied by the Plaintiff.

35. I also note that, even then, the Plaintiff attributed the symptoms displayed by the ducks to poor environment of rearing the ducks, however in my considered opinion although the general hygiene cannot be ruled out as much as it was purely alluded to by the Plaintiff, without tangible proof and may have been and/or could contribute to the problems experienced by the ducklings, it is clear from the evidence adduced that, whatever feeds tested, failed the aflatoxin test as per the report produced herein and had effect on the problem experienced by the ducks.

36. However, assuming the Defendant has proven that the feeds supplied by the Plaintiff had deficiency, has the Defendant proved the loss allegedly suffered? The Defendant's claim is in special damages in the sum of Kshs 7,700,000.00. The law is clear, special damages must not just be proved but specifically proved. The Defendant in proof thereof has produced sales summary for the period of September to December 2007, showing inter alia, sales in the sum of Kshs 8,375,125.30, and the sales summary for the period of September to December 2008 in the sum of Kshs 4,868,736.10 (see page 24-25). Further records provided showed, sales for the period of July-August 2007, in the sum of Kshs 2,466,262.10 and for the period of July- August 2009 in the sum of Kshs 1,129,662.10 (page 25-25). Finally, the records for the periods of July to September 2007 in the sum of Kshs 3,942,966.55, and July to September 2010 in the sum of Kshs 1,070,150.55.

35. It is noteworthy that, these documents are supporting the particulars of the loss as tabulated under paragraph 5 of the counter claim. The Defendant states thereunder that: the loss and the production shortfall is made up as follows:

Period (year)	Amount (Kshs)
a) 2007-2008	3,503,189.00
b) 2008-2009	1,335,600.00
c) 2010	2,872,815.00
Total amount	7,714,804.00

36. In the Defendant's main witness statement recorded by Sheilah, she states at paragraph 12 and 13, as follows:

"We then dosed the feed with selenium and vitamins as recommended by Dr. Mungai and were able to see a marked difference in 3 weeks. As the production was low there were losses in sales between the same period for 2007 and 2008 of about Kshs. 3,503,189.00."

"There was consequent production shortfall in 2008 which resulted in a further monetary loss of Kshs. 1,335,600.00 making the total loss of Kshs. 4,838,789.00 as at end August 2009."

And finally at paragraph 20 she states:

"It is my view that Belfast Millers failed to supply feed fit for the purpose of rearing ducks and consequently occasioned Ruaraka Duck quantified total losses for 2010 in the sum of Kshs. 2,872,815.00 making the total claim Kshs. 7,714,804.00."

37. In her oral evidence she states as follows: -

"I have also put in a counter-claim for loss of turnover. See page 22 and 23 of Defendant's bundle. At page 22 is a document of

turnover when I was doing well. The one at page 23 relates to the period when we were making loss due to the problem. The said claim relates to losses in the production of eggs. I arrived at the amount using comparisons of period of good production.”

38. Similarly I have considered the statement of Mr Stephen Mutisya Mutuku and I note that, first and foremost, the witness states that he had worked for the Defendant from 1st July 2007 to 20th March 2011 the date of writing the statement but states that he was working in the capacity of a “farm worker” that his duties included working on the parent house which involved collection of eggs, taking them to the hatchery, washing them and keeping records of daily count, setting the eggs in the incubators, candling them on day 12 or 14, sorting out the infertile eggs, and moving to the hatchery on day 25 to hatch. At the slaughter he operated the plucking machine and packing ducks –report. It is note worthy that throughout the entire statement he does not make reference to any records and/or statistics in income or loss suffered as stated in the counterclaim. Yet, in cross-examination during the hearing, he stated that he was in charge of daily records of egg production between July 2008 to 2011, but even then, he did not support his evidence to that effect with records.

39. The Plaintiff submitted that the records produced by the Defendant were generated by Sheilah Taylor on her own, and “threw” them to the court for interpretation. That the information on the computation must have been derived from records that “the Defendant intentionally avoided producing or the figures are imaginary and fabrication.” Therefore, in the absence of records to prove the number of eggs lost/damaged or the number of ducks that lost weight or died, the claim is not proved.

40. In my considered opinion, the Defendant has not proved the special damages claimed in the counter claim. The records of production prior to the period of August 2008 were not produced to show the egg collection and/or the mortality rate of the ducks. When asked in cross-examination, the main witness stated that, they ran into a mountain. Though she testified the data from which she drew the analysis produced exist, she conceded, the same was not availed in court. She also conceded that the records relating to the turn over period for the year 2007 and before were not produced. I therefore find that based on the evidence produced, the Defendant’s claim in the counter claim is not proved on a balance of probabilities as required.

41. I shall now revert to the Plaintiff’s claim. Basically, the claim is not Defended in terms of the sum sought as the Defendant faulted the merchantability of the feeds. I have already held that the evidence adduced does prove that the samples tested were purely from the Plaintiff’s supply. But assuming there was proof, what options are available under the law, to a purchaser of goods, who receives goods that are not fit for the purpose for which they are required?

42. The law relating to sale of goods is regulated by the sale of goods Act (cap 31) of the laws of Kenya (herein “the Act”). However basically the general rules of contract law apply to contracts for the sale of goods as provided for under section 59(2) of the Act. (reproduce).

43. Similarly, the rule of caveat emptor (let the buyer beware) at common law applies, that is, where a buyer of goods acquires no express warranty to the goods, he takes the risk of quality himself. Therefore, he has no remedy where he relies on his skill and the goods turn out to be of poor quality. However, the Act applies brakes on this rule, and implies terms into every contract of sale of goods unless they are expressly excluded by the parties. These terms implied are; conditions and warranties provided for in the Act.

44. The provisions of Section 13(1) of the Act stipulate that whether a term is a condition or warranty depends on each case upon the construction of the contract. This is founded on the basis that the breach of a contract gives rise to treat the contract as repudiated and breach of warranty gives rise to claim in damages. Among the conditions implied in contract of sales under Section 15 of the Act, is the condition implied by the description. The section states that where there is a contract for sale of goods by description then there is an implied condition that the goods shall correspond with the description. Further Section 16(b) of the Act, states that, where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not) there is an implied condition that the goods shall be of merchantable quality. Provided where the buyer has examined the goods, there shall be no implied conditions as regards defects which that examination ought to have revealed. However, if such examination by the buyer does not reveal defects and the goods turn out to be defective, when put in the use, the buyer can repudiate the contract and claim damages.

45. In the instant case, the Defendant alleges that, it found deficiency in the feeds as far as mid July 2008, but took no action until March 2011, when a counter claim was filed. There is no evidence that, the Defendant repudiated the contract. In fact, the Defendant only came to lodge a claim after the Plaintiff sued for recovery of the price of the goods supplied. In my opinion if the Plaintiff did not supply goods of merchantable quality then the claim for special damages should have been in addition to, or general damages after repudiation of the contract.

46. It also suffices to note that, the law is settled that, it is a duty of the seller to deliver the goods and the buyer to accept and pay for them in accordance with the terms of the contract of sale. Unless agreed otherwise, or goods are sold on credit, the delivery of the goods and the payment of the price are concurrent, arising out of the same time as per Section 30 of the Act. This is supported by section 29 of the Act, and under Section 31, where the seller delivers goods of wrong quantity or description, the buyer must reject them, but if he accepts the goods so delivered, he must pay for them at the contract rate or price. Acceptance under section 36 of the Act is deemed to take place where the buyer does any act to the goods which is inconsistent with the ownership of the seller (emphasis mine).

47. In this case, there is evidence that goods in question were delivered, received and retained and/or used. As such the seller is entitled to the rights available to the unpaid seller which includes the right to sue the buyer for the price of the goods, if the goods have already been passed to the buyer as provided for under section 49 of the Act. Thus, in view of the fact that, the Defendant holds the subject feeds and/or has retained/used the same, the Plaintiff is entitled to sue for the price.

48. In conclusion therefore, I find that, the Plaintiff has adduced sufficient evidence supported by the invoices and the delivery notes produced and having not been challenged by the Defendant is therefore entitled to be paid in the sum of Kshs 1,072,000.00 plus costs and interest. I therefore enter judgment in favour of the Plaintiff as prayed with interest at court rates from the date of filing the suit until judgment in full.

49. However, although the Defendant has proved the Plaintiff supplied the feeds, based on the correspondence between the parties and the documents produced, the Defendant failed to support the allegations to the effect that the feeds tested were from the Plaintiff. Similarly the non-production of reports filed by inter alia KARI, Bora Biotechnology did not aid the Defendant's case as to the conclusive cause of the problem. Further, the failure to prove the special damages. I therefore dismiss the counter claim with no orders to costs.

50. Those are the orders of the court.

Dated, delivered and signed in an open court this 17th day of July 2019.

G.L. NZIOKA

JUDGE

In the presence of:

Mr. Orenge for the Plaintiff

Ms. Kamau for the Defendant

Dennis -----Court Assistant