



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 183 OF 2009

KENYA TEA DEVELOPMENT AGENCY LTD.....PLAINTIFF

-VERSUS-

VICTORY TEA BROKERS.....1ST DEFENDANT

HON. KIPNG'ENO NG'ENY.....2ND DEFENDANT

HON. (PROF) SAMSON K. ONGERI.....3RD DEFENDANT

JUDGMENT

1. By its Complaint dated 17th March 2009 and filed in court the same day, the Plaintiff, initially sought from three Defendants the recovery of the sum of **Ksh 73,658,275.79** on account of the purchase price of the Plaintiff's tea sold at an auction conducted by the 1st Defendant as a broker and pursuant to the various Tea Brokerage Agreements executed between the parties. The Plaintiff further prayed for costs and interests on such costs and principal sum from the 30th October 2008 till payment in full.

2. When served, the Defendants filed several statements of defences. The defence by the 1st Defendant is dated 19th May 2009 and filed on 20th May 2009, that by the 2nd Defendant is dated and filed on the 4th May 2009, while that by the 3rd Defendant was dated and filed the same day with that of the 1st Defendant.

3. In the statements of defences filed, the 1st Defendant denies the claim against it and asserts that the goods were released from the Plaintiff's premises that the goods were removed from its godown by the Plaintiff's own employee in collusion with a third party called **Chacha Tea Limited** in a fraudulent manner for which action the Plaintiff is vicariously liable and not the 1st Defendant. The claim was denied *in toto* by the 1st Defendant and a prayer made that it be dismissed with costs.

4. For the 2nd Defendant the defence put up was to the effect that the suit against it was fundamentally misconceived and denied any knowledge of the allegations at paragraphs 10 and 11 of the Complaint and invited strict proof. The 3rd Defendant on its part denied having made any representations to the Plaintiff as pleaded in paragraph 10 and 11 of the Complaint, denied being liable to the Plaintiff in the sum claimed and asserted that the Plaintiff's suit against it was frivolous, misconceived and otherwise abuse of the court process deserving being dismissed with costs.

5. On the application of the 2nd and 3rd Defendants, the court by a ruling dated 3rd November 2009 struck out the suit against the 2nd and 3rd Defendant for being embarrassing to the two. The matter thus proceeded to hearing with only the 1st Defendant facing the Plaintiff's claim.

6. When the matter came up for hearing there was evidence by an affidavit of service that the 1st Defendant was served on the 19th August 2009 but no appearance was made on its behalf. The matter thus proceeded with the Plaintiff's witness giving evidence and without being cross-examined.

Evidence by the Plaintiff:

7. **PW1 Royford Mutembe**, the sales accountant for the Plaintiff, adopted his witness statement dated 27th February 2009 and filed on the 2nd March 2009 as evidence in chief, then produced all the documents in the bundle and list of documents dated 29th August 2008 and marked same as EXH P1. The evidence led was to the effect that the claim was grounded upon tripartite agreements variously dated 1st July 2006, 30th August 2006 and 15th September 2006. On the basis of the said brokerage agreements the witness said that the 1st Defendant took

possession of the tea, conducted a sale and received the purchase price but did not remit the sum as agreed between the parties. It was shown in evidence and by the document at page 229 to 233 of EXH P1 that when the plaintiff made a demand the 1st Defendant readily admitted owing the debt. There were also statements of accounts produced to show the value of tea sold and the sums remitted and that outstanding. The evidence and document further show that indeed there was a bank guarantee in the sum of Ksh 20,000,000/- which was recalled by the plaintiff but not taken into account to reduce the sum owed.

8. Based on the evidence on record, it is not in disputed that there existed various agreements, executed between the Plaintiff, the 1st Defendant and various tea factories referred to as **Tea Brokerage Agreements**. It is also not disputed that there were sales 37 and 38 whose proceeds were never remitted as pleaded by the Plaintiff and the sum stood at **USD 923,385.69**. With that state of evidence the question one may pose is whether the defence filed by the Defendant can be viewed as having been made in good faith.

9. In the defence filed, the substantial issue raised was that the release of the goods to **Chacha Tea** was done fraudulently by the Plaintiff's servants for reason the Plaintiff and not the Defendant was to be liable to meet the loss thereby occasioned. I consider and deem that statement of defence as mere allegations having not been supported by any evidence. I also find it not made with *bona fides* but incredible and I therefore choose to believe the un rebutted evidence in the document authored by the Defendant itself admitting the sum to be outstanding. I do find that as at the date the suit was filed the Defendant owed to the Plaintiff the sum of **USD 923,385.69** which when subjected to the pleaded exchange rate of **Ksh 79.12** to the **USD** gives a sum of **Ksh 73,058,275.79** as at February 2009. To that sum the Plaintiff admits having received **Ksh 20,000,000/-** out of the Bank guarantee, thus leaving the sum of **Ksh 53,058,275.79** as due and payable to the Plaintiff.

10. For that sum I do enter Judgment for the Plaintiff against the 1st Defendant together with costs thereof as well as interest at court rates from the 30th October 2008, being the contractual date the sum was due for remittance to the Plaintiff, till payment in full.

Dated this 6th day of September, 2019

PATRICK J. OTIENO

JUDGE