

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 461 OF 2011

KENYA PIPELINE COMPANY LTD.PLAINTIFF

VERSUS

CORPORATE BUSINESS FORMS DEFENDANT

J U D G M E N T

1. **Kenya Pipeline Company Limited** (the Plaintiff) is a state corporation under the Ministry of Energy. It operates a pipeline system for transportation of refined petroleum products to various parts of the country.

2. **Corporate Business Forms Limited** (the Defendant) is a Limited liability company incorporated under the Companies Act.

3. It is not denied that the Plaintiff and the Defendant had a contractual relationship. Under that contract the defendant acted as the clearing agent for the Plaintiff. The Defendant cleared at the port goods imported by the Plaintiff. That involved the Defendant in paying all duty due to Kenya Revenue Authority (KRA) amongst other payments. The Defendant would thereafter raise an invoice for the Plaintiff to reimburse such payments and also payment of 3% agency fee.

4. It is also not denied that the Defendant, between the years 2008 and 2010 issued invoices for reimbursement for payments made on behalf of the Plaintiff. Those invoices were as follows:

Invoice Number	Form C-63	KRA Claim (Kshs.)	3% Disbursement Fee (Kshs.)	Total (Kshs.)
3432	2008JKA213478	555,249.00	19,322.67	574,571.67
3433	2008JKA220799	337,654.00	11,750.36	349,404.36
3435	2008JKA409513	1,084,641.00	37,745.51	1,122,386.51
3431	2007JKA303250	451,457.00	15,710.70	467,167.70
3430	2007JKA303229	326,043.00	11,346.30	337,389.30
3450	2008JKA526018	6,857,822.00	238,652.21	7,096,474.21
			TOTAL	9,947,393.74

5. It is admitted, by the Defendant, that the Plaintiff settled the aforesaid amounts.

6. It is the Plaintiff's claim that on or about 5th October 2009 the Plaintiff received a demand from KRA seeking for payment of duty for the goods cleared by the Defendants which relate to the invoices set out above. The Plaintiff alleges that the defendant acted fraudulently by:

a. Claiming for amounts purportedly paid to the KRA when none was actually paid;

b. Accepting payments from the Plaintiff as reimbursement for amounts not spent; and

c. Forging documents indicating that the goods had been cleared by KRA.

7. It is on the basis of the above that the Plaintiff prays for judgment in its favour for Kshs. 9,947,393.74.

8. The Defendant by its defence pleaded that the Plaintiff had failed to furnish it with the demand made by KRA and that the Plaintiff instead elected to pay KRA a debt that did not exist. The Defendant further pleaded that it procedurally cleared the Plaintiff's goods, paid all the

amounts payable to KRA and consequently KRA released the Plaintiff's goods which were delivered to the Plaintiff.

9. The Defendant also denied the Plaintiff's claim for Kshs. 9,947,393.74 and pleaded that the said amount was paid to KRA, by the Plaintiff, without justification.

10. There are only two issues that need addressing in this case. The first issue is: did the Defendant pay KRA duty in respect to goods imported by the Plaintiff for Kshs. 9,947,393.74. The second issue is: if the answer to the first issue is in the negative is the Plaintiff entitled to claim the amount of Kshs. 9,947,393.74 from the Defendant.

11. The Plaintiff called three witness to prove its case.

12. Paul Mutisya, an acting Senior Procurement Officer of the Plaintiff, was the first witness. He gave clear evidence of the contractual relationship between the Plaintiff and the Defendant. Making reference to the various invoices, produced before court, which were issue by the Defendant for settlement by the Plaintiff, this witness testified of how the Plaintiff's claim against the Defendant amounts to Kshs. 9,947,393.74. The witness stated that the Defendant presented to the Plaintiff documents which looked genuine and which were accompanied by actual delivery of the Plaintiff's consignment that was being imported. He further stated that het Plaintiff engaged a consultant Pricewater House Cooper Limited (PWC) which established that there were payments due and payable to KRA. Accordingly, the Plaintiff made demand to the Defendant to settle the amount claimed.

13. The second witness for the Plaintiff was Pamela Ondago, the Chief Accountant of the Plaintiff. She stated that the Plaintiff's finance department received from the Plaintiff's procurement department a letter forwarding documents which indicated the Defendant had paid duty to KRA for goods it had cleared on behalf of the Plaintiff. The finance department processed the payment to the Defendant for the amount claimed hereof by the Plaintiff. The witness stated that later the Plaintiff established that the KRA demand for duty related to the Defendant's non-remittance of import duty and value added tax (VAT) to KRA. Further that the Plaintiff had paid the Defendant 3% commission for taxes purportedly paid by the Defendant. That following further investigation the Plaintiff established that the amount demanded by KRA as import duty, VAT and Import Declaration Form (IDF) had been paid to the Defendants but that the Plaintiff had to make further payments of those, import duty, VAT and IDF to KRA in order to facilitate the removal of agency order placed on the Plaintiff's Bank account.

14. Stephen Okello was the Plaintiff's third witness. He is a Director, Tax Legal Advisory Services at PWC. He stated PWC was an international audit firm and tax advisory company. The witness had worked at PWC for 30 years. He has had 26 years' experience as Tax and Legal Advisor.

15. The witness sated that PWC was engaged to review supporting documentation for KRA's tax claim against the Plaintiff. The audit by PWC revealed the Defendant was directly implicated in the claim for non-remittance of tax, on behalf of the Plaintiff, of Kshs. 9,612,866. The said non remittance contributed to the claim to the Plaintiff made by KRA.

16. The witness presented to court PWC report on its review of KRA tax claim against the Plaintiff. That report shows that PWC's review led to a reduction of the tax claim by KRA form Kshs. 242,727,680 to Kshs. 91,652,011. PWC's report revealed that the Plaintiff had been a victim of elaborate scam perpetrated to defraud it money. The fraudulent scheme involved fictitious documents presented to the Plaintiff by various clearing agents in support of taxes allegedly paid to KRA, on behalf of the Plaintiff. PWC also found that in some instances IDF that had previously been fully utilized were used by clearing agents to create fictitious custom entries while at other times there were no IDF at all. PWC also found, in its review, that part of the amount demanded by KRA was in relation to taxes paid by the Plaintiff to its clearing agents but the clearing agents had failed to remitted the amount to KRA. One such agent that had perpetrated that scheme was the Defendant. PWC identified consignments handled by the Defendant. In so doing PWC found the some of the import entry numbers, made by the Defendant, were not in KRA record as per the Simba Computer System. Some of the import entry numbers, made by the Defendant, belonged to different imports as per the Simba System. PWC also found that some of the payments reflected as made by the Defendant on behalf of the Plaintiff were either not received by KRA or the amount received by KRA was less than the amount indicated by Defendant in the import entry document. PWC produced a detailed finding in respect to each import entry, which are the subject of the Plaintiff's claim. In some instances, the banking slips, presented by the Defendant, from National Bank of Kenya, were found not to have been received by the said bank and moreover the stamp on those bank slips were not in use by the bank on the dates in question.

17. PWC found that out of the KRA's claim of Kshs. 91,652,011 of taxes, made to the Plaintiff, Kshs. 9,612,866 was attributable to the Defendant. PWC gave a detail breakdown of that amount as follows:

Import Entry Number	Issue Noted	Amount (KES)
2008JKA213478	Entries not in Simba System	555,249.00
2008JKA220799		337,654.00
2008JKA409513	Entries with different importers on Simba System	1,084,641.00
2007JKA303250		451,457.00
2007JKA303229		326,043.00

2008JKA526018	Entry with varying taxes due on Simba System	6,857,822.00
Total		9,612,866.00

18. The Defendants case was supported by the evidence of Joseah Kogo, the Defendant's director. He stated in evidence in chief that the Defendant was contracted by the Plaintiff, between the years 2006 and 2008, to provide custom clearance and connected services. The Plaintiff instructed the Defendant to pay all the charges and thereafter submit invoice to the Plaintiff for reimbursement. The Defendant proceeded to clear all the Plaintiff's consignments by following all the laid down procedure of KRA and delivered the goods to the Plaintiff. Although the witness did not categorically deny perpetrating the acts alleged by the Plaintiff he stated that tax fraud or evasion was a criminal offence and yet none of the defendant's directors or employees had been investigated and the Defendant continued to be lincenced by KRA, as a custom agent.

ANALYSIS AND DETERMINATION

19. Now is an appropriate moment to consider the issues raised above.

DID THE DEFENDANT PAY KRA DUTY IN RESPECT TO GOODS IMPORTED BY THE PLAINTIFF FOR KSHS. 9,947,393.74

20. As stated before it is not denied that the Defendant presented to the Plaintiff various invoices for clearing Plaintiff's goods and those invoices were paid. This is what the Plaintiff alleged and the Defendant confirmed it.

21. The issue, therefore, for consideration is: did the Defendant pay duty to KRA, on behalf of the Plaintiff, to be entitled to be reimbursed by the Plaintiff. The Defendant in evidence, through the testimony of tis director, stated that the taxes were indeed paid to KRA.

22. The Plaintiff, particularly through the report presented by PWC, clearly demonstrated, on a balance of probability, that the duty was either not paid or under paid by the Defendant. What other conclusion can one reach when the Plaintiff, through the evidence of PWC, stated that some import entry numbers used in respect to clearance of some consignments of the Plaintiff related to clearance of good of other third parties. Further there are correspondence by National Bank of Kenya which confirm that some of the banking slips, presented by the Defendant, bore stamp or banking staff signature which were different to those being used by the bank. When PWC's report revealed those irregularities in the clearance of the Plaintiff's goods the Defendant had an evidential burden to shift in order to prove the banking slips were genuine and that indeed the taxes were paid. The court of appeal in the case **MBUTHIA MACHARIA V ANNAH MUTUA & ANOTHER [2017] eKLR** discussed the burden of proof and stated thus:

“[16] The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence? In this case, the incidence of both the legal and evidential burden was with the appellant.”

23. The Defendant was the one who supplied the documents to the Plaintiff representing payment to KRA. The Defendant therefore bore the evidential burden of proof to prove that that payment was indeed made to KRA. The Defendant failed to shift that burden of proof.

24. On the whole considering the evidence adduced I find and hold that het Defendant did not pay, and in some cases under paid, KRA in respect to the consignments of the Plaintiff, the subject of this suit. The first issue is therefore in favour of the Plaintiff. The Defendant did not pay duty in respect to goods imported by the Plaintiff.

25. The Defendant, by its written submission erred to suggest that the determination on whether it was liable depended on whether there was vicarious liability. Defendant argued that the Plaintiff had a responsibility to show it had authorized the Defendant to clear goods through custom. That the Plaintiff being a public entitily such an appointment, of the Defendant, ought to have been in compliance with the Public Procurement and Disposal Act, 2005.

26. The Defendant erred to so submit because whether or not the Defendant had been appointed to clear the Plaintiff's goods through custom is not an issue for my determination. This is because the Defendant by its defence and through the evidence of its Director admitted there was a contractual relationship between it and the Plaintiff for clearance at the part of the Plaintiff's good. In the face of such clear admission why would the Plaintiff be required to prove it had appointed the Defendant.

27. Similarly, the Defendant erred to argue the Plaintiff failed to prove principal/agent relationship between it and the Plaintiff. The Defendant relied on the case **PZ CUSSONS EAST AFRICA LIMITED V KENYA REVENUE AUTHORITY (2013) EKLR**. in that case the petitioner's case was that the purported fraud had been perpetrated by unauthorized agents unlawfully using the claimant's PIN to carry out transactions on the Simba System. The claimant in that case also alleged KRA had failed to give it information about KRA tax claim. It is clear that that case **PZ Cussons (Supra)** is distinguishable to this case in the facts before the court.

28. Further in response to the Defendant's submissions I find and hold the PWC was not required to provide evidence that it was a Tax Agent. This is because whether or not it was a Tax Agent was not an issue before court and also because Mr. Okello from PWC said he was a Tax Agent within the meaning of the Tax Procedure Act and that evidence was not contradicted.

29. It is not material to this case that KRA has continued to licence the Defendant as an agent and it is also not material that the Plaintiff did not report to the police the nonpayment of taxes.

IF ISSUE NO. 1 IS IN THE NEGATIVE IS THE PLAINTIFF ENTITLED TO CLAIM Kshs. 9,947,393.74

30. The Plaintiff proved that it paid the Defendant's invoices when presented, by the Defendant. The Defendant also admitted being paid. In making that payment the Plaintiff proved it reimbursed the Defendant the supposedly payments of custom duty and other payment. For the Plaintiff to have been required, which it did, to pay KRA once again for the same duty it had reimbursed the Defendant means that it is entitled to the judgment it seeks. This is because I have already made a finding that he Defendant did not pay the duty claimed in this case. The second issue, therefore, is also found in favour of the Plaintiff.

31. The Plaintiff, in my view is however not entitled to judgment as prayed in the Plaint. This is because PWC, its consultant, after carrying out a detailed analysis found that the amount not paid or under paid by the Defendant to KRA was Kshs. 9,612,866 and not as claimed in the Plaintiff. It is that amount that the Plaintiff will be awarded in this case. The Plaintiff did not adduce evidence why the interest on that amount should be at commercial rate, as submitted, and accordingly interest will be at court rate.

32. The Plaintiff having prevailed in this case it is entitled to the costs of the suit.

33. In the end there shall be judgment for the Plaintiff against the Defendant for:

a. Kshs. 9,612,866 with interest at court rate from the date of filing suit until payment in full.

b. Costs of this suit.

DATED, SIGNED and DELIVERED at NAIROBI this 4TH day of OCTOBER, 2019.

MARY KASANGO

JUDGE

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

Sophie.....COURT ASSISTANT

.....FOR THE PLAINTIFF

.....FOR THE DEFENDANT