REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 173 OF 2014

(CORAM: F. GIKONYO J.)

REGNOL OIL KENYA LIMITED.....APPELLANT

VERSUS

TOTAL KENYA LIMITED.....RESPONDENT

[An appeal against the Judgement of the Hon. M. Murage (Mrs.), CM delivered on 15TH April 2014 in Milimani CMCC No. 3862 of 2010]

JUDGMENT

Restitution for wrongful act

1. The Appellant herein was the plaintiff in the trial Court whereas the Respondent was the Defendant. Vide plaint dated 31/03/2006 the Appellant sought a refund of Kshs. 4,817,400/= being monies paid for the purchase of 91,000 litres of kerosene at Kshs 95/= and 14,000 litres of diesel at Kshs 51.6/= per litre.

2. It was the appellant's averment that on 28/3/2006 he purchased the petroleum products from the Respondents which was acknowledged through Sale receipt dated 28/3/2006. He averred that despite payment the Defendant/Respondent neglected, failed and or refused to deliver the purchased petroleum products.

3. The Respondent denied the claim through defence dated 5th May 2006 which was subsequently amended on 26th June 2006 in whichthe Respondent raised a counterclaim. It was averred that the Defendant enjoyed undue and unauthorized price advantage in the month of April, May, June, July August, November and December 2015 thus causing the plaintiff loss in the sum of Kshs. 2,106,400/=.

4. The Respondent admitted that it was willing to supply the Appellant with the products equivalent to the difference or pay any sums due to it. Vide a letter dated 26th June 2006 the Respondent confirmed payment to the appellant of Kshs. 2,711,000/= thus, the amount for determination by the trial court is Kshs. 2,106,400/=.

5. During the hearing each party called one (1) witness.

6. The trial court found that there was no evidence made by the Appellant to prove that he paid the correct amount for goods depending on where he ordered them from. The trial court also found that there was evidence from the audit report that the appellant did not pay the amount that was supposed to be paid for the products. She therefore found that on a balance of probabilities the Respondent had justified the retention of the money paid by the Appellant which was the difference between what was paid and what ought to have been paid.

The appeal

7. Aggrieved by the aforesaid decision the Appellant filed its memorandum of appeal raising ten (10) grounds of Appeal all contesting the decision of the trial Magistrate that the Respondent was entitled to the balance claimed in the counterclaim.

8. On 12/07/2019 this Court directed that the appeal be canvassed by way of written submissions. Both parties have filed their respective submissions.

Submission of the Parties

9. The Appellant submitted that the trial Magistrate erred in finding that the Respondent was justified in retaining the money in issue. They

justified the quarrel with that decision; that money was for a specific transaction and because the Respondent had failed to supply the products it ought to have refunded the money. To them, the trial Magistrate's finding were an impermissible amendment of the contract between the Appellant and the Respondent.

10. It was also submitted that the Respondenthad notmade a claim that the appellant obtained money through false pretences hence the trial court over-stepped its duty by attempting to try and adjudicate issues not before it. According to them, there was no evidence that the appellant colluded with the respondent's employee to enjoy undue price leverage.

11. The Appellantsubmitted further that the trial Magistrate erred in allowing the Respondent to recover money from the Appellant which money, the respondent had lost through an act of its own employee. Thus, allowing the respondent to derive a benefit from misdeeds of its employee. The particulars stated showed the employee acted alone and not jointly with the Respondent.

12. Lastly it submitted that the trial magistrate relied on extraneous evidence. The Appellant relied on the following cited authorities; **Whispering Palms Hotel vs. Computech East Africa Ltd [1987] eKLR, Madhupper International Ltd &An v Kenya Commercial Bank Ltd & 2 others [2003] eKLR, Amolo Company Ltd v SmithKline Consumer HealthCare ltd & An [2007] eKLR, Waruhiu K'Owade &Nganga Advocates v Mutuma Investments Ltd [2016] eKLR**.

13. The Respondent submitted that what matters is whether the claim was raised and evidence led thereto for its determination. They argued that the appellant's claim for restitution cannot be made since they sought to benefit from its own misconduct or misbehaviour. Having obtained unfair price advantage to the tune of the amount claimed, their action is an attempt to approbate and reprobate at the same time.

14. It submitted also that the Respondent proved their counterclaim against the appellant as during cross-examination the plaintiff/Appellant's witness admitted to have been in an arrangement with their employer.They relied on the following cited authorities; **Madhupaper International Ltd & An v Kenya Commercial Bank Ltd & 2 others [2003] eKLR, Amolo Company Ltd v SmithKline Consumer HealthCare ltd & An [2007] eKLR, Kaanja Muchiri v Proctor & Allan [E.a.] Limited [2009]eKLR.**

ANALYSIS AND DETERMINATION

15. As first appellate court; I should evaluate the evidence and come to own conclusions except I am reminded that I neither saw nor heard the witnesses. See**: SELLE & ANOTHER vs. ASSOCIATED MOTOR BOARD COMPANY LTD. [1968] EA 123**. In this exercise, the court is not beholden or compelled to adopt any particular style. What must be avoided however is mere rehashing of evidence as was recorded or trying to look for a point or two which may or may not support the finding of the trial court. Of greater concern should be to employ judicious emphasis and alertness, have an eye for symmetry or balance (where legally permitted) and an ear for subtleties of evidence adduced so as not to miss the grace and power of the testimony of witnesses and the applicable law. Such style insists on simplicity in writing and keeping as close as possible to the words used in the testimony recorded. Ultimately, little difficulty or none at all will be experienced in making the overall impression of the evidence, facts and the law applicable in sheer clarity and directness. I shall so proceed.

16. I have carefully perused and understood the contents of the pleadings, proceedings, judgment, grounds of appeal, submissions and the decisions referred to by the parties. I see three issues in this appeal, namely:-

a. Whether the counterclaim herein lay;

b. Whether the counter claim was proved to the required standard; and

c. Whether the trial court rightly dismissed the Appellant's suit.

17. Although it is not my style to reproduce the evidence adduced, but given the nature of this case and the issues at hand, I will concisely set out the evidence. **Pw1 Abdirizar Bishar** Supply and Operations mining of the Appellant testified that the Respondent supplied the Appellant with petroleum products of which they had a resale account. The arrangement was that when they had a purchase they deposit the money and they delivered the product on confirmation.

18. That on 28/3/2016 they ordered 91,000 litres of kerosene and 14000 litres of diesel. They paid the sum of Kshs. 4,817,902.50 viabanker's cheque to which he was issued a receipt. They never received any products in respect of the payment. On following up they were informed that the money was held on account of fraud between them and state for unclear pricing.

19. He told the court that it is the Respondents who set the prices and they agreed with them. The amounts were pre-paid. He denied knowing Enock Anthony Kibet, an employee of the respondent and denied knowledge of the fraudulent transaction or having been questioned by the police over the matter.

20. He presented the **KCB Bankers Cheque dated 28/03/2006 as Exh1, Cash sale receipt dated 28/03/2006 as Exh 2 and Demand Letter dated 30/03/2006 as Exh 3**

21. In cross-examination however he stated; (1) that they had a station in Mombasa; (2) that the invoicing is different from when they buy in Nairobi; (3) that in this case they ordered the products from Nairobi; and (4) that he had an arrangement with Kibet to reduce the prices in their favour.

22. In re-examination he testified that he had not joined the Company at the time and that this information was from the records.

23. **Dw1 Lilian Ndirangu** an accountant of the respondent testified that when an audit was done it was revealed that the appellant had

bought products at a lower price than the one approved. That the products were to be loaded in Nairobi. But prices invoiced were for Mombasa.

24. She told the court that when a customer makes an order, they are given prices and amount to pay. They make payment. Once confirmed it is receipted. Invoicing is done when they are supplied with the products. It is a manual process but receipting and invoicing is automated. Prices were in the system correctly but one of the staff captured the Order as if the products were being bought in Mombasa.

25. She presented the **Audit report** as **Exhibit 1** and the **Charge sheet as exhibit 2**.

26. In cross examination she stated that the case against Kibet was conducted in the year 2006. That when they conducted the audit they did not inform the appellant. That the figure Kibet was charged with was different because he had colluded with other customers. She told the court that it is the finance department that puts the prices and they therefore cannot blame customers when they accept their orders.

27. In re-examination she stated that the Appellants knew the prices of both Nairobi and Mombasa. That Enock Anthony Kibet worked in the customer service department where they placed orders capture them in the system and invoice.

Nature of counterclaim

28. Arguments have arisen about the counterclaim herein which makes it important to address the subject a little more. **TheBlack's Law Dictionary 9th Edition page 402** describes a counterclaim as a claim for relief asserted against an opposing party after an original claim has been made. It also describes a compulsory counterclaim as a claim that relates to the opposing party's claim and arises out of the same subject matter. Permissive counterclaim is however different for it doesnot arise out of the same subject matter as the opposing party's claim or involves third parties over which the court does not have jurisdiction.

29. In **Order 7 rule 3 of the Civil Procedure Rules** a counterclaim is described in the following terms:-

> **"A defendant in a suit may set-off, or set-up by way of counterclaim against the claims of the plaintiff, any right or claim, whether such set-off or counterclaim sound in damages or not, and whether it is for a liquidated or unliquidated amount, and such set-off or counterclaim shall have the same effect as a cross-suit, so as to enable the court to pronounce a final judgment in the same suit, both on the original and on the cross-claim; but the Court may on the application of the plaintiff before trial, if in the opinion of the court such set-off or counterclaim cannot be conveniently disposed of in the pending suit, or ought not to be allowed, refuse permission to defendant to avail himself thereof." [Emphasis added]**

30. In **County Government of Kilifi v Mombasa Cement Limited [2017] eKLR** in its interpretation of **Order 7 Rule 3** the Court was of the opinion that a plain reading of the provisions allows or gives a defendant in a suit permission or a carte blanche, to raise a counterclaim based on any right or claim against a plaintiff.The provision says nothing on whether such counterclaim must be related to the original subject matter of the suit or does not hint to any such implication.Literary work in **Halsbury's Laws of England, Fourth Edition, vol. 42**, defines a counterclaim as follows:-

> **"When A has a claim of any kind against B and brings an action to enforce that claim, and B has a cross-claim of any kind against A which by law he is entitled to raise and have disposed of in the action brought by A, then B is said to have a right of counterclaim."[Emphasis added].**

31. Therefore the law permits the respondent to raise a counterclaim against the Appellant on any right and claim it may have against the appellant even where the subject matter or cause of action maybe different from the original suit. This design is to avoid multiplicity of suits which may be conveniently adjudicated and determined in a single proceeding between the same parties.No application was made in the trial court under **Order 7 rule 3 of the Civil Procedure Rules**to reject the counterclaim for reason that it cannot be conveniently dealt with in the suit or that the court should disallow the counterclaim. Accordingly, nothing prevented the trial court from trying the counterclaim. The trial court was therefore right in considering the counterclaim in its entirety.

Proof of counterclaim and dismissal of suit

32. The next question is a twinning of whether the trial court was right in dismissing the appellants claim and allowing the respondents counterclaim.

33. The evidence presented was that the Appellant's employees colluded with an employee of the respondent and obtained an advantage in unfair pricing in favour of the Appellant. The respondent's employee was charged in Criminal Case No. 597 of 2006 Republic vs. Enoch Anthony for the offence. The audit report shows that on diverse dates between April and December 2005 the appellant benefitted from unfair prices. This evidence was not controverted by the appellant. Their witness was wavering. In cross-examination he stated; (1) that they had a station in Mombasa; (2) that the invoicing is different from when they buy in Nairobi; (3) that in this case they ordered the products from Nairobi; and (4) that he had an arrangement with Kibet to reduce the prices in their favour.

34. Despite denial by the Appellant, evidence show that they were aware of the under-pricingarising from collusion with the Respondents employee.The question then becomes: Was the Respondent in these circumstances entitled to restitution of the benefit?

35. I will seek help from case law. The case of **Madhupaper International Ltd & An v Kenya Commercial Bank Ltd & 2 Others [2003] eKLR**sets out the basis for making a claim for restitutionas follows;

1. Non-voluntary conferment of a benefit, suchas through mistake or on account of compulsion, necessity or in ignorance, or due to an unequal condition between the payer and payee;

2. Voluntary conferment of benefit for total failure of consideration;

3. Benefit conferred in consequence of a wrongful act, such as where a trustee benefits from a breach of trust;

4. Ultra vires demand;

5. Abuse of power entrusted to the defendant by Parliament or by a contractual instrument such as debenture or other agreement;

6. Illegitimate use of self-help sanctions;

7. Vindication of equitable title to property.

36. The Respondent herein showed through the audit reportsthat it suffered loss from the actions of its employee and those of the Appellant. It bears repeating that, despite denials by the Appellant, the witness admitted there was an arrangement with Kibet on price leverage. This is collision and wrongful act. The evidence by **DW1**was that the appellant knew the different prices for Nairobi and Mombasa, at any given time. In fact, the Appellant's witness admitted that they were aware of the different prices for Mombasa and Nairobi. He stated that they made an order from Nairobi. He also admitted they had an arrangement with the employees of the Respondent on price leverage. From the evidence, they were invoiced on the price of another region but which was low. The difference in price is the benefit that was conferred upon the Appellant through the wrongful act of their employees. This was to the detriment of the Respondent. Therefore, the appellant is merely feigning ignorance of the matters complained of.

37. The appellants witness provided the causal linkin the collusion between the appellant and the Respondents Employee. The audit report proved the loss it suffered as a result of the collusion herein and the amountwas ascertained. The Respondent has proved that the benefit the Appellant obtained is the Appellant's loss. This was a benefit conferred in consequence of a wrongful act of collusion. A court of law will never allow any person to keep such benefit.

38. This is a case for restitution based on wrongdoing. The Appellant benefited from the collusion between its employees and those of the Respondent at the expense of the Respondent. In **David Securities Pty Ltd vs. Commonwealth of Bank of Australia [1992] 175 CLR 353** cited in **Hookway Case** Dawson J. stated that

> **"Restitution is not however, a principle which requires, in examining any particular payment, 'some subjective evaluation of what is fair or unconscionable'; rather recovery depends upon the existence of a 'qualifying or vitiating factor such as mistake, duress or illegality'…."[Underlining mine]**

39. The vitiating factor here is the collusion which was an illegality and wrongful. This fundamental factor was proved on a balance of probabilities and is the basis for recovery of the money obtained through wrongful act of collusion. The benefit was also ascertained; it wasequivalent to the loss suffered by the Appellant. Therefore, the respondent proved its counterclaim and is entitled to restitution of the amount of money it held.

40. The result of the foregoing analysis is this; the appeal herein lacks merit and is dismissed with costs to the Respondent.

Dated and signed at Meru this 30th day of October 2019

F. GIKONYO

JUDGE

Dated, signed and delivered in open court at Nairobi this 4th day of November, 2019

L. NJUGUNA

JUDGE