



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & TAX DIVISION
CIVIL SUIT NO. 473 OF 2011

ISAAC MUGWERU KIRABA t/a

ISAMU REFRI- ELECTRICALS.....PLAINTIFF

VERSUS

NET PLAN EAST AFRICA LIMITED.....DEFENDANT

JUDGMENT

Introduction

1. This suit concerns a claim for the balance of agreed price for goods sold and delivered by the Plaintiff to the Defendant in 2010 and 2011. The amount claimed is Kshs. 5,014,019/= together with interest and costs.
2. The Plaintiff is an individual trading as a firm. He deals in electrical goods and ware. His business at all material times was by both wholesale sourcing and supply of assorted electrical products and equipment. He controls his business solely.
3. The Defendant is a company registered in Kenya. It avails electrical services. Evidence revealed that the Defendant outsources electrical products and equipments and counter-instals the same to its clients in various sites. Part of the outsourcing was from the Plaintiff.

Claim in bare outline

4. The Plaintiff says he dealt with and sold certain electrical goods to the Defendant at agreed and or reasonable prices and on credit. The credit terms were that the Plaintiff would upon delivery of the goods to the Defendant raise invoices and the payment would then be made within 30 days. The goods supplied included cables, insulators, connectors and lights. The Plaintiff says that even though he made deliveries at the Defendant's request and subsequently raised invoices the Defendant failed to settle all the invoices, leaving a balance, in value of goods, of Kshs. 5,014,019/= by the end of 2011.
5. The claim is made in respect of sums the Plaintiff alleges are due under several invoices. The invoices are 45 in total. They were produced during the evidentiary hearing. The Plaintiff claims the invoices, as asserted in the Plaint, relate to supplies made in 2010 and 2011. The invoices are outlined in both the statement of account availed by the Plaintiff through a Further List of Documents filed on 1 March 2012 and through the List of Documents filed on 24 October 2011, at inception of the claim.

The Defence in bare outline

6. Whilst admitting having occasionally ordered goods from the Plaintiff, the Defendant denied owing the amounts claimed stating that all the goods supplied were fully paid for.
7. The Defendant disputes delivery and points out that there is fraud on the part of the Plaintiff and additionally alleges unjust enrichment on the part of the Plaintiff.
8. The Defendant also says that there is more to this case than meets the eye as the Defendant's ex-employees now turned the Plaintiff's witnesses are the same ones who prepared the orders from the Plaintiff and also allegedly received the goods from the Plaintiff. In this respect, the Defendant not only alleges that it previously paid the Plaintiff for goods not supplied but also a conspiracy between the Plaintiff and the Defendant's individual employees to defraud the Defendant.
9. A part from defence of non-delivery, there is not pleaded any of the defences known under either statutory law or equity, to a claim based on a contract for sale of goods.

History of the proceedings

10. The claim which was filed on 24 October 2011 was certified ready for trial in March 2014, even though the Defendant had not filed its witness statement and Bundle of Documents. The Defendant was later to file a short witness statement by one Andrew Ayres on 8 April 2015.
11. Trial originally commenced on 18 July 2016, before Hon. Lady Justice Farah Amin but even after a couple of adjournments the evidentiary hearing was not finalized. Trial started de novo before me on 11 May 2017 following the transfer of Hon. Lady Justice Amin. Hearing was only concluded on 14 December again after a couple of adjournments at the Defendant's instance.
12. Court sessions concluded with the Defendant's counsel Mr. Jackson Omwenga making his closing submissions. The Plaintiff was represented through the proceedings by Mr. Muturi Kamande.

Discussion and Determination

Issues

13. The main issue which has to be determined as emerged prior to trial (from the pleadings) and during the trial is whether the Defendant is liable to the Plaintiff for the price of the goods sold and delivered as alleged in 2010 and 2011. And if so, what is the quantum of such liability.
14. As will be evident shortly, the main issue is pegged upon the proof of certain facts by the Plaintiff contested by the Defendant with regard to the supply and delivery of goods.

The evidence

15. The Plaintiff called two witnesses in addition to himself during the evidentiary hearing.
16. The Plaintiff testified that he had known and dealt with the Defendant since the year 2008. The Defendant was the Plaintiff's customer and would pay in cash for all the supplies but later the parties agreed to a thirty-day credit period which went on well through 2009. However from 2010 the Defendant started defaulting by not settling the invoices raised by the Plaintiff on time and as of 3 August 2011 the Defendant's account with the Plaintiff had a debit balance of Kshs. 5,014,019/=.
17. The Plaintiff availed documents in the form of local purchase orders raised by the Defendant, delivery notes, invoices as well as a demand letter. The Plaintiff also provided a detailed statement of account and insisted that the documents were enough prove the Plaintiff's case.

18. There were also two additional witnesses presented by the Plaintiff.

19. PW2 and PW3 were Evanson Njuguna and John Gathogo Mwangi respectively. Both PW2 and PW3 were previously in the employ of the Defendant.

20. PW2 testified that the Plaintiff and the Defendant had always had a business relationship with the Plaintiff supplying the Defendant with goods. PW2 confirmed that he was an accountant with the Defendant up till 2011. And that by the time he ceased working for the Defendant, the Plaintiff's account had not been fully settled. PW2 insisted that he had no relationship with the Plaintiff and had also not been promised any payment for testifying in court.

21. PW3, like PW2 before him, also confirmed that he worked for the Defendant as a procurement officer between 2008 and 2011. It was PW3's testimony that the Plaintiff supplied goods to the Defendant on the basis of local purchase orders issued by the Defendant. PW3 testified further during cross examination, that he used to prepare the local purchase orders which would always be approved by his superiors including the Defendant's managing director. In cross-examination, PW3 denied being related to the Plaintiff or having any interest in the claim by the Plaintiff.

22. The Defendant did not call any witness despite the two opportunities availed and extended by the court following the closure of the Plaintiff's case.

23. I noted though that the Defendant had filed a singular witness statement. I have had to disregard the statement which was signed by Andrew Ayres on 30 March 2015 and filed in court on 8 April 2015. He did not appear before me to confirm and adopt the statement and neither had the statement been made under oath.

Approach to the evidence vis-à-vis the law

Law

24. It must be common ground that the burden of proof lies on the Plaintiff to establish on a balance of probabilities that he supplied goods to the Defendant and transferred the property in the supplied goods to the Defendant for an agreed money consideration. This is the essence of a contract for sale of goods as defined by s.3(1) of the Sale of Goods Act (Cap 31) Laws of Kenya.

25. The Plaintiff's obligation, once a contract is proven, was to deliver the goods and transfer the property in them. The Defendant on the other hand had the obligation to accept the goods and pay the price in exchange of the property granted.

26. In my judgment an action for the price of goods sold and delivered is what is left for any seller of goods once the property in the goods has been transferred to a buyer. Consequently, such an action, as in the instant case, implies that property has already passed and the seller who claims ought to succeed if he proves delivery at an agreed or reasonable price and no known defence is set up by the buyer. As was stated in the case of **Ex part Gordon [1808] 15 Vs 286**, the price is to be claimed after the period due for payment has lapsed and not earlier. Then, the buyer is specifically bound to perform his part of the bargain by paying for the goods.

Credibility of witnesses

27. Before transiting to the evidence, I wish to point out that the Defendant's counsel in his closing submissions inter alia, stated that "*PW2 and PW3 cannot be trusted*". The basis, as I understood Mr. Omwenga, was that PW2 and PW3 were part of a conspiracy to defraud the Defendant and further, in the alternate, that they were disgruntled employees. The credibility of the witnesses had been called to question.

28. Three individual witnesses (PW1, PW2 & PW3) gave oral evidence before me. I had the opportunity

and advantage to hear and observe them as they testified. I deal with their respective credibility shortly.

29. PW1 was the Plaintiff himself. He at times, during the brief evidentiary hearing, seemed frustrated by the way he claimed the Defendant had behaved. In the context that he is the claimant, his frustration can well be understood. He however gave his evidence clearly and in my view completely honestly and credibly. I was confident I could rely on his evidence.

30. PW2 was an ex-employee of the Defendant. He testified on behalf of the Plaintiff and thus against his former employer. He however, in my view, dealt very well with the suggestion that he had an interest in the Plaintiff's claim and also the underlying transactions. In answer to a question posed by myself as to whether he had been promised any payment by the Plaintiff, PW2 appeared bemused but without hesitation answered in the negative. Through his brief evidence, PW2 did not try to make the best for the Plaintiff as against his former employer. Again, I felt I could rely on his evidence.

31. PW3 was also an ex-employee of the Defendant. The same remarks apply to him as to PW2. I had no reason to doubt their evidence especially in the absence of any evidence relating to their conduct prior to and after the institution of the claim in 2011.

Analysis

32. I have considered the evidence as well as counsels' submissions.

33. I must from the onset point out that the Plaintiff who is bound by his pleadings lays his claim for the price of goods sold supplied in 2010 and 2011 not earlier. Paragraph 4 of the Plaintiff is clear that

***“On diverse dates [sic] between the years 2010 and 2011 the Plaintiff supplied to the Defendant various electrical goods at the Defendant's request. The Defendant paid for the supplied goods leaving a balance of Kshs. 5,014,019/= which is due and owing.*”**

34. It is to this claim the Defendant responded to by denying that goods were supplied and or at an agreed price. The claim does not relate to any commercial dealings prior to 2010 and any evidence related to that period must be ignored.

35. On the price of goods, the evidence revealed this.

36. The Defendant would raise local purchase orders and dispatch the same to the Plaintiff (as per PW2 & PW3's testimony). The local purchase orders contained the prices quoted. The Plaintiff would then accept the local purchase orders by supplying and delivering to the Defendant the goods.

37. Upon such delivery being accepted it could only be on the basis of the prices quoted. It certainly, in my judgment could not have been in the contemplation of the parties that the Plaintiff would after delivery of the goods 'quote' his own prices in the invoices raised. Acceptance by the Plaintiff of local purchase orders meant also an acceptance of the prices quoted in the orders. Commercial and business-sense would not dictate otherwise.

38. The Plaintiff relied on the local purchase orders as the basis of the contract and I do not see how it may be possible that the price was varied. The price was always agreed upon and it was the price quoted in the local purchase orders, in my view.

39. As to delivery, the evidence was also revealing.

40. The three witnesses all testified on the same plane. Delivery was made at the Defendant's premises by the Plaintiff. It was neither through a carrier nor by way of collection. The delivery was accompanied by the delivery notes which were signed by the Plaintiff's officers and duly stamped once the goods were verified to match the local purchase orders. In this regard, the Plaintiff availed in evidence various delivery notes duly signed and stamped. I duly reviewed these delivery notes as were contained in the

Bundle of Documents filed on 24 October 2011.

41. In my view, and in the absence of any evidence of rejection of the goods either at the time of delivery or even within a reasonable period after delivery, property in the supplied and delivered goods passed to the Defendant once the goods were accepted and the delivery notes stamped and signed. The Defendant then had to pay for the delivered goods at the agreed prices being the local purchase order prices.

42. I may perhaps add that the invoices followed after a reasonable period of time and according to the Plaintiff's testimony, which I have no reason to doubt, the Defendant had thirty days to settle the invoices. This afforded the Defendant with reasonable opportunity to raise any issues on both the quality of the goods if at all and also on the prices. The evidence reveals that no issue was raised by the Defendant until after the claim was filed when the Defendant alleged non- delivery and fake invoices.

43. It brings me to the question as to which goods were delivered and paid for, if at all and at what price during the period 2010 and 2011.

44. The starting point must be the detailed statement of account which was filed on 1 March 2012. The statement run from 2008 through 2011. It has all the invoices raised. As already indicated the Plaintiff's claim must be limited to the period "between 2010 and 2011". I must concentrate only on the orders and deliveries made and invoices raised in 2010 and 2011. As the Plaintiff also testified that his claim relates to the balance of unpaid goods, I must also discern the payments made during that period (2010 and 2011) and duly give credit.

45. From the Plaintiffs own evidence a total of 45 invoices were raised and duly entered in the Defendant's statement of account during the years 2010 and 2011. They were:

<i>Date</i>	<i>Invoice No</i>	<i>Amount</i>
a) 25.9.2010	1620	121,800/=
b) 12.10.2010	1634/35/36	216,659/=
c) 12.10.2010	1637	18,560/=
d) 29.10.2010	1645	4,872/=
e) 29.10.2010	1639	13,444/=
f) 12.11.2010	1729	137,953/=
g) 29.11.2010	1726	133,893/=
h) 29.11.2010	1718	16,541/60
i) 29.11.2010	1721	31,598/40
j) 04.12.2010	1757	32,596/=
k) 06.12.2010	1758	36,888/=
l) 28.12.2010	1782/83/84	257,241/60
m) 06.01.2010	1790	223,340./=
n) 12.01.2011	1795/96/97	295,829/=

o) 14.01.2011	1799	75,226/=
p) 17.01.2011	1800	58,162/40
q) 18.01.2011	1778/79/80	438,700/40
r) 25.01.2011	1804	323,698/=
s) 31.01.2011	1810	29,812/=
t) 22.02.2011	1818	87,498/80
u) 22.02.2011	1835	42,316/80
v) 22.02.2011	1839/40	288,950/20
w) 23.02.2011	1836/37/38	257,746/20
x) 28.02.2011	1827/28/31	355,302/20
y) 01.03.2011	2101	134,826/80
z) 01.03.2011	2102	140,621/00
aa) 01.03.2011	2103	22,939/00
bb) 07.03.2011	2118	7,250/00
cc) 07.03.2011	2117	97,788/00
dd) 18.04.2011	2009	324,370/00
ee) 18.04.2011	2012	382,875/00
ff) 03.05.2011	2046	353,243/20
gg) 03.05.2011	2043	349,763/20

46. The total value of the above invoices is Kshs. 5,312,305/40. The statement of account was accepted in evidence without contest. Both PW1 and PW2 testified that the statement reflects the true position of the Defendant's indebtedness to the Plaintiff.

47. I have reviewed the invoices against the purchase orders and also the delivery notes to confirm both the prices as well as the supply/delivery. I found four variances. All the invoices itemized (a) to (k), (m) to (q), (s) to (cc) and (ee) inclusive matched both the respective delivery notes and the purchase orders where the prices were indicated. The prices in these invoices were identical to those in the purchase orders, the delivery notes as proven also established the fact that the ordered items and goods were delivered at the order prices.

48. With regard to the invoices itemized as (l), (r), (dd) and (gg) variances could be identified vis-à-vis the respective orders and delivery notes.

49. The order price for items in the invoice indexed above as number (l) was Kshs. 271,915. The invoice raised was Kshs. 257,241/60. The delivery note indicates that six items originally ordered were cancelled on the delivery note or asterixed. This would, in my judgment, be an indication that these items were not actually delivered. As property in the items did not pass, no payment may be made for them. This would

explain the variance on the invoice amount in relation to the order price.

50. Invoice no. 1804 itemized as (r) above was for Kshs. 323,698/=. The order was for various items and goods also for the value price of Kshs. 323,699/=. However, there is no evidence that all the ordered items were delivered. The delivery note presented in evidence to establish the claim reveals that 185 No. metallic trunkings of 50 x 50mm were not amongst the items delivered to the Defendant under Delivery Note No. 1926 of 17 December 2010. The Plaintiff could not therefore lay claim to the value (price) of these trunkings. The price quoted in the order was Kshs. 240,500/= and the same amount is reflected in the corresponding invoice.

51. Additionally, the price for the wall-plugs as ordered was Kshs. 1100/= per plug. Yet for 10 wall plugs, the Plaintiff claimed Kshs. 18,000/= exclusive of VAT. I did not hear the Plaintiff to lead any evidence that the market price for the plugs was Kshs. 1,800/= per plug. The parties must thus be held to their bargain of Kshs. 1100/= per plug, exclusive of VAT.

52. There were price variances on the invoices itemized as (dd) and (gg) above. In the former case, the order price was more by some Kshs. 2500/= while in the latter case the order price was less by some odd Kshs. 3400/=. The order price in the latter case was Kshs. 346,370/20. In both cases however the ordered goods were delivered.

53. In the result, I find that the value price of the goods invoiced as sold and delivered by the Plaintiff to the Defendant in 2010 and 2011 aggregated Kshs. 5,312,305.40. Delivery was actually not made of goods valued at Kshs. 240,500/= excl. VAT. Yet this was invoiced and is claimed. Likewise, the Plaintiff also over-priced an item by Kshs. 7000/= excluding VAT. Finally, there was an invoice inflated modestly by some Kshs. 2,500/=. These amounts ought to be deducted from any amount found due to the Plaintiff.

54. The Plaintiff claimed Kshs. 5,014,019/= as the price balance of goods sold and delivered in 2010 and 2011. The Plaintiff admitted to having received some payments from the Defendant during this period. Evidence of such payment may be traced to the statement availed by the Plaintiff in evidence. The statement of accounts reveals that the following payments were made after the supplies in 2010:

a) Kshs. 121,800.00 on 12.11.2010

b) Kshs. 391,488.00 on 27.12.2010

c) Kshs. 1,000,000.00 on 01.2.2011

d) Kshs. 500,000.00 on 21.4.2011

Total 1,912,488/=

55. Credit must be given for the amounts paid to avoid any element of unjust enrichment.

Conclusion and disposal

56. I have found based on the Plaintiff's claim, pleadings and evidence that during the period 2010 and 2011 the Plaintiff sold and delivered to the Defendant an assortment of electrical goods and equipment for which the Defendant was liable to pay at the agreed order price. I have also found that admittedly the Defendant made various payments to the Plaintiff during the same period. I have further found that the Plaintiff invoiced for some items it did not deliver and further that in one instance the Plaintiff over-invoiced the Defendant. The formula is consequently simple and I will deal with it in final disposal.

57. In conclusion, I find that the Plaintiff has partially established his claim to the required standard and I now enter judgment for the Plaintiff as follows by way of disposal.

Value of goods delivered- Kshs. 5,312,305.40

<i>(a)Less Amount Paid</i>	<i>Kshs.</i>	<i>1,912,488.00</i>
<i>(b)Less Goods not delivered</i>	<i>Kshs.</i>	<i>240,500.00</i>
<i>(c)Less over- invoiced</i>	<i>Kshs.</i>	<i>9,500.00</i>
<i>Less VAT on (b)& (c)</i>	<i>Kshs.</i>	<i>40,144.00</i>
<i>Net total due</i>	<i>Kshs.</i>	<i>3,109,817.40</i>

58. The result is that the Plaintiff is entitled to judgment in this sum. I enter judgment for the Plaintiff against the Defendant in the sum of Kshs. 3,109, 817.40/= together with interest and costs of the suit.

59. Decree accordingly.

Dated, signed and delivered at Nairobi this 2nd day of February, 2018.

J.L.ONGUTO

JUDGE