REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL SUIT NO. 123 OF 2011

BROOKSIDE DAIRY LIMITED….....PLAINTIFF

VS

ADONCAN NJAGI, FIDEL NYAGA AND DEDAN RIUNGU

Sued as registered officials of MUTHIMU DAIRY SELF HELP GROUP……. DEFENDANT

JUDGMENT

[1] The plaintiff **BROOKSIDE DAIRY LIMITED** commenced this suit by way of a plaint dated 19th September 2011 and sought among other orders special damages in the sum of Kshs. 25, 604, 769.57 and costs of the suit.

[2] It is the plaintiff's case that on 25th May 2010 they entered into a tank agreement with the defendant and agreed that the plaintiff would install a milk cooling tank at the defendant's premises in consideration of the defendant supplying all its milk to the plaintiff only unless otherwise directed. The agreement was renewed by a further agreement in writing dated 1st May 2011 which was valid up to 30th November 2011. The plaintiff would collect or the defendant would deliver a minimum of 10,000 kilograms of milk per day at the agreed price. On or about 16th July 2011 the defendant purported to terminate the agreement with effect from 25th July 2011 by a notice dated 16th July 2011. The plaintiff by its letter dated 20th July 2011 cautioned the defendant against violating the terms of the agreement herein. The caution notwithstanding, the defendant reiterated its intention to terminate the agreement and threatened to remove the cooling tank.

[3] The plaintiff is aware of that the defendant intends to or has entered into a milk supply agreement with a third party which is in blatant breach of the said agreement. This has resulted in the plaintiff incurring losses of the cost of the cooling tank (10, 000 litres) in the sum of Kshs. 4,194, 183.92/- and loss of income up to 30th November 2011 of Kshs. 21, 410, 585.65/- which brings it to a total sum of Kshs. 25, 604,769.57/- which it seeks from the defendant as special damages.

[4] In the amended defence dated 11th November, 2014 the defendant denied the allegations of particulars of breach of the tank and milk supply agreements and puts the plaintiff to strict proof. The defendant averred that if in any case they did enter into an agreement it was on 25th May 2008 and not 25th May 2010 which was to last for a period of one year and not 5 years as indicated. The defendant admitted that the plaintiff did supply and install a 10,000 litres milk cooling tank at its premises but it was in the year 2008.

[4] The defendant stated that it did not enter into the agreements dated 29th December 2010 and 1st May 2011 freely but was induced into signing it by undue influence of the plaintiff who threatened to reduce the prices of the unpaid mill downwards by Kshs. 4 per kg if the agreement was not signed. The defendant stated further that it was forced to terminate the said agreements due to frustration from the farmers who threatened to cut off milk supply to the defendant if the prices of milk are not adjusted. Furthermore, farmers formed splinter groups within the defendant's group as a result of the low milk prices which lowered the quantity of milk to the defendants.

[6] In its reply to defence dated 1st December 2014, the plaintiff reiterated what it had stated in its plaint. The Plaintiff denied allegations of altering the tank agreement, particulars of undue influence and frustration and puts them to strict proof. They insisted that the agreement dated 25th May 2010 contains the terms and conditions governing the parties. The plaintiff pleaded that the agreement was made on 25th May 2010 whereas the tank had been installed on or about the year 2008 as the delay of execution was caused by the defendant. They saw the defence as incurably defective and one that offends the mandatory provisions of the Civil Procedure Rules 2011 and should be struck out.

***Viva voce* evidence**

[7] The plaintiff called one witness **DW1 James Ng'ang'a** Regional Manager, Central Rift and part of Central province. He adopted his statement and further statement dated 19th September 2011 and 28th October 2018 respectively as his evidence-in chief. He also produced in evidence list of documents and supplementary list of documents dated 19th September 2011 and 23rd April 2014, respectively.

[8] He affirmed that there was a previous agreement dated 25th December 2010 where the milk price was Kshs. 30 per kg. In the 2011 agreement milk price was Kshs. 27 per kg plus Kshs. 3 transport totaling Kshs. 30/-. In the letter dated 2nd January 2011 the plaintiff merely cautioned on failure to sign suppliers' contract which is not coercion. He ascertained that the last supply from the defendant was on 24 th July 2011 after the defendant defaulted on the agreement. He complained that the defendant did not comply with the court order which required the defendant to continue supplying milk during the pendency of this case.

[9] At the close of the plaintiff's case, the defendant called one witness. **DW1 Jasper Nyaga M'Muga** chairman of the defendant who produced his statement dated 21st November 2018 as his evidence-in-chief. He confirmed that the defendant signed the milk supply agreement dated 29th December 2010 and 1st May 2011 voluntarily and were not forced because the price of milk was good. That milk from the defendant's members was the only one put in the one tank provided by the plaintiff. He could not remember whether there was any complaint of price of milk from the farmers between the tenure of the agreements. They entered the agreements freely except when the plaintiff dropped their price of milk, farmers started to migrate to other buyers. For this reason, they could not supply milk to Brookside. After they stopped supplying milk, Brookside tried to source for milks elsewhere and the defendant started to source for milk from another processor namely Daima, which is paying them good prices.

Submissions

[10] Parties were directed to file submissions to support their respective cases. Only the plaintiff complied. The plaintiff submitted that the defendant's conduct in unilaterally terminating the milk supply agreement was oppressive and vindictive. The reasons advanced for termination had no foundation in law as the plaintiff had not breached any part of the agreement. The plaintiff being in the business of processing milk for sale incurred loss of income of which it has a right to claim for under **Section 51 and 54 of the Sale of Goods Act** and claimed the loss of profit in the sum of Kshs. 21,410,585.65/. Moreover, they pray for general and exemplary damages as adequate compensation for the breach of the milk supply agreement and disobedience of court orders.

ANALYSIS AND DETERMINATION

Issues

[11] The plaintiff filed a statement of issues on 12th July 2012 and listed eight (8) issues therein which may be collapsed into two comprehensive issues, namely:-

> ***1. Whether the defendant breached the terms of the milk supply agreement dated 1st May 2011 by terminating it before the expiry of the contract period; and***
>
> ***2. Whether the defendant is liable to pay the plaintiff special damages for loss of income as well as aggravated damages arising from the breach of the milk supply agreement dated 1st May 2013?***

Breach of contract

[12] Was the defendant in breach of the terms of the milk supply agreement dated 1st May 2011 when it terminated it before the expiry of the contract period? From the defendant's defence they declared that did not enter the said agreement and if they did it was because they were threatened to by the plaintiff who threatened to reduce the milk prices. When **DW1** gave his testimony he confirmed that the defendant entered into the agreement dated 29th December 2010 and 1st May 2011 freely and without any coercion. Thus, it is safe to conclude that the plaintiff and defendant entered into the said agreements voluntarily, freely and without any coercion.

[13] In the agreement dated 29th December 2010 it it was stipulated that the defendant was to supply 10, 000 to 18, 000 Kgs of milk a day at a price of Kshs. 30/-. Upon expiry of the said agreement, parties entered into another agreement dated 1st May 2011 where the defendant was to supply 10,000 – 15,000 Kgs as per the price indicated. This contract was valid up to 30th November 2011. Those being the terms of the agreement each party to the agreement is bound by them. This was so expressed by the Court of Appeal in the case of **National Bank of Kenya Ltd v Pipe plastic Samkolit (K) Ltd & another [2001] eKLR** where it held as follows:

> ***"A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge."***

[14] On 16th July 2011 the defendant wrote a termination letter to the plaintiff stating that they will terminate the contract with them as from 25th July 2011. The reasons given thereof were two, to wit:

> ***(1) That Brookside is not in a position of adding Kshs. 1.50 for chilled milk; and ***
>
> ***(2) That Brookside was encouraging splitter groups within Muthiru Dairy catchment area.***

[15] Concerning the first reason, I find it to be self defeating because the terms for supply and prices of milk were clearly set out and fixed in the agreement. And addition of Kshs. 1.50 for chilled milk is not one of the terms of the agreement. Second, any variation of the terms of the contract ought to be in accordance with agreement or with mutual consent of the parties or as may be permitted in law. No such term of adding Kshs. 1.50 for chilled milk was negotiated and agreed by the parties to the agreement. Therefore, the first reason for purported termination of the agreement herein is far-fetched and only known to the defendant.

[16] Needless to state that it is trite law that parties are governed by the terms of the contract of which this court cannot re-write. The agreement stipulated the price as a result the first reason is impotent and cannot be a basis for termination of the agreement by the defendant.

[17] The second reason was that Brookside was encouraging splinter groups within the defendant's group. The defendant attempted to explain that as a result of low milk prices by the plaintiff farmers started to form splinter groups and the quality of milk supply to the defendant went down. According to the defendant farmers even threatened to refuse to provide milk to the defendant if the prices of milk were not increased. **DW1** declared that all these problems with the agreement were caused by the farmers and farmers defied court orders to continue supplying milk.

[18] The foregoing insinuates frustration of contract. According to the ***Black's Law Dictionary Ninth Edition at page 740***:

> ***"The doctrine that if a party's principal purpose is substantially frustrated by unanticipated changed circumstances, that party's duties are discharged and the contract is considered terminated."***

[19] Again, according to **Halsbury's Laws of England (3rd edition)**, volume 8 pages 185 (ii), the **Doctrine of Frustration** para 320:

> ***"...the doctrine of frustration operates to excuse further performance where (i) it appears from the nature of the contract and the surrounding circumstances that the parties have contracted on the basis that some fundamental thing or state of things will continue to exist, or that some particular person will continue to be available, or that some future event which forms the foundation of the contract will take place, and (ii) before breach performance becomes impossible or only possible in a very different way to that contemplated without default of either party, and owing to a fundamental change of circumstances beyond the control and original contemplation of the parties. The mere fact that a contract has been rendered more onerous does not of itself give rise to frustration."***

[20] In this case, **DW2** told the court that they only told their advocates of the farmers' complaints. He alluded to some record of deliberations they had about the grievances of the farmers but he did not produce the minutes thereto. The defendant alleged existence of splinter groups by farmers which led to dwindling of the supply of milk. They had the legal burden of proving that allegation. There was no any or any tangible evidence to substantiate the claim let alone corroborate it. I do not find any evidence of splinter groups or encouragement of splinter groups by Brookside. These were mere allegations by the defendant. I expected the defendant to produce evidence of the number of farmers supplying the milk and the dwindling numbers thereto. I also expected them to show that they continued to supply the milk available from the compliant farmers. These are matters that should be in their daily records of milk received from farmers and supplied to Brookside. Such analysis would have shown whether there was substantial change in supply of milk as to affect their obligation to supply the milk to Brookside as epr the agreement. None of these things were provided. There was no justifiable reason to disobey the court order herein. The burden to proof frustration lay on them but failed to discharge it. Therefore, their second reason to terminate the contract does not hold sway.

Liability

[21] The second issue is *whether the defendant is liable to pay the plaintiff special damages as pleaded in the plaint for loss of income arising for the breach of the milk supply agreement dated 1st May 2013*. According to the plaint, the plaintiff claimed that the income they lost from 26th July 2011 to 30th November 2011 is Kshs. 21,410,585.65/- . The plaintiff affirmed that the defendant at all times knew that it was in the business of processing milk for sale. The milk purchased from the defendant was processed and sold by the plaintiff for profit. From the plaintiff's potential loss schedule they have tabulated how they reached to the figure they are claiming. They multiplied the total volumes they were to expect with their profit margin of Kshs. 16.97/-.

[22] I am content to cite the decision of the Court of Appeal decision in **John Njoroge Michuki vs Kenya Shell Ltd Civil Appeal No. 227 of 1999** that:-

> ***"As regards contracts between persons not under a disability or at arms length, the courts of law should maintain the performance of contracts according to the intention of the parties and should not overrule any clearly expressed intention on the basis that the judges know the business of the parties better than the parties themselves".***.

[23] I will also fall back on **Section 51 and 54 of the Sale of Goods Act.** Section 51 states:

> ***(1) Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may maintain an action against the seller for damages for non delivery.***
>
> ***(2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the seller's breach of contract.***
>
> ***(3) Where there is an available market for the goods in question the measure of damages is prima facie to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver.***

[24] Section 54 provides:-

> ***Nothing in this Act shall affect the right of the buyer or the seller to recover interest or special damages in any case where by law interest or special damages may be recoverable, or to recover money paid where the consideration for the payment of it has***

failed.

[25] In their assessment the plaintiff has used the minimum amount of kilograms expected to have been received from the defendant that is 10,000 Kg then multiplied by their profit margin of Kshs. 16.97/-. When **DW1** was giving his testimony he stated that after they failed to supply milk to the plaintiff, the latter went ahead and sourced for other suppliers as they had another cooling tank 5 Km from the defendant's premises. Evidence has it that the cooling tank on their premises was taken away by the plaintiff before the expiry of the agreement. This has not been rebutted by the plaintiff. Consequently, this means that the plaintiff sourced for other suppliers to mitigate their loss as a prudent suitor should act. We are not told when exactly the tank was taken away from the defendant's premises or when the plaintiff sourced and obtained milk from elsewhere. I note that, according to the plaint, the plaintiff claimed that the income they lost from 26th July 2011 to 30th November 2011 which is Kshs. 21,410,585.65/-. This is a period of barely over four months. I suppose it would be reasonable to assume that they would have taken sometime to transfer and install the tank and source milk from other sources. I do not think four months is unreasonable period of time for that exercise. During that period they are deprived of profits. They provided documents to support their claim and quantum on lost income. Therefore the plaintiff has proved their claim for loss of profits and I award them loss of income from 26th July 2011 to 30th November 2011 is the sum of Kshs. 21,410,585.65/-.

[26] Moreover, when the court ordered the defendant to continue supplying milk to the plaintiff it failed to do so. The **DW1** avowed that the farmers were the ones that disobeyed the court order. The Court of Appeal in **A.B. & Another v R.B. [2016] eKLR** cited with approval the Constitutional Court of South Africa's decision in *Burchell v. Burchell* Case No.364 of 2005 where it was held:

> ***"Compliance with court orders is an issue of fundamental concern for a society that seeks to base itself on the rule of law. The Constitution states that the rule of law and supremacy of the Constitution are foundational values of our society. It vests the judicial authority of the state in the court and requires other organs of the state to assist and protect the court. It gives everyone the right to have legal disputes resolved in the courts or other independent and impartial tribunals. Failure to enforce court orders effectively have the potential to undermine confidence in recourse to law as an instrument to resolve civil disputes and may thus impact negatively on the rule of law."***

[27] The rule of law and administration of justice demands compliance with court orders. The interim order issued on 19th September 2011 which was solidified by the judgment delivered on 24th November 2011 stopped the defendant from termination the milk supply agreement. The defendant did not supply milk despite the order of court. The order was directed to the defendant and not the farmers therefore this was utter disobedience on the part of the defendant. Such acts are aggravating the situation.

[28] Accordingly, this suit is meritorious and judgment is hereby entered for the plaintiff as against the defendant in the following specific orders:

a) In the sum of Kshs. 21, 410,585.65/- as special and exemplary damages.

b) Costs and interest.

Dated, signed and delivered in open Court in Meru this 13th day of December, 2018

F. GIKONYO

JUDGE

In presence of

M/s Ayata for defendant

Ann Kithaka for Ireri for plaintiff

F. GIKONYO

JUDGE