



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 504 OF 2009

MALTAURO SPA.....PLAINTIFF

- VERSUS -

RICHARD WAMAE T/A

GRAW ENTERPRISES.....DEFENDANT

RULING

1. The Plaintiff's application dated 29th September 2009 seeks the striking out of the Defence dated 9th September, 2009.
2. The basis for seeking that order is that the Plaintiff – deems the Defence to be frivolous and vexatious and considers it to be intended to prejudice and delay the fair trial of the case.
3. At this early point in the Ruling, it is necessary to point out that there had previously been a Ruling delivered on that application. However, the said Ruling has apparently gone missing from the court file, completely.
4. As a result of the missing Ruling, it had not been possible for the Decree – Holder to take further steps to execute the Decree.
5. The claim by the Plaintiff is for Kshs.19,491,000/=, in respect to money which the Plaintiff paid to the defendant, on the understanding that the Defendant would sell and deliver to the plaintiff, an agreed quantity of bitumen.
6. It is the Plaintiff's case that the total quantity of bitumen which the Defendant contracted to sell to the Plaintiff was 410,000 Kilogrammes.
7. It is the Plaintiff's further case that the agreed contractual price was Kshs.29,930,000/=.
8. The Plaintiff said that it paid the full purchase price to the Defendant. However, the Defendant only delivered to the Plaintiff 143,000 kilogrammes of bitumen, whose value was said to be Kshs.10,439,000/=.
9. As the Defendant continued to hold the balance of the purchase price, whilst it had failed to deliver the balance of the bitumen, the Plaintiff brought this suit, to enable it get the balance of the money.

10. In the face of the claim, the Defendant asserted that it delivered to the Plaintiff, all the bitumen, for the agreed sum. Therefore, the Defendant insisted that it had been discharged from any liability.
11. In the alternative, the Defendant blamed the Plaintiff for the failure to discharge its mandate of paying for the port charges and Demurrage. As a result of the said failure, the Defendant asserted that its obligation to deliver the quantity of bitumen was reduced on a pro-rata basis, to the charges which the Defendant incurred.
12. The Plaintiff has exhibited the 2 cheques through which it paid kshs.29,930,000/= to the Defendant.
13. The Plaintiff has also exhibited the 13 Delivery Notes and 13 Invoices, which prove that the value of the bitumen which the Defendant delivered to the Plaintiff was Kshs.11,992,440/=.
14. Considering that there is uncontroverted proof that the Defendant received Kshs.29,930,000/=, but that it only supplied bitumen worthy Kshs.11,992,440/=, it follows that the Plaintiff is entitled to a refund of all the money in respect to which the Defendant failed to deliver bitumen.
15. I also find that the Defendant has failed to demonstrate that the Plaintiff had an obligation to pay port charges or Demurrage.
16. The Defendant has also failed to produce any evidence to show the extent of the Plaintiff's alleged obligation, or the basis upon which the Defendant would have been entitled to deliver less bitumen than it had contracted to deliver.
17. There is no evidence at all, from the defendant that it paid any port charges or demurrage.
18. In the result, there is absolutely no basis in law, or in fact for finding that the defence raises any triable issues.
19. In its submissions, the Defendant challenged the deponent of the Plaintiff's supporting affidavit, as not having the requisite authority to swear the affidavit on behalf of the Plaintiff.
20. The deponent, **ORLANDO CAPPELLARI**, described himself as;

“.....the Regional Manager of the Plaintiff's Kenya Branch; I am familiar with the facts of this matter and duly authorised by the Plaintiff to make this affidavit on its behalf.”
21. From the outset, the deponent made it expressly clear that he had the requisite authority from the plaintiff to make the supporting affidavit.
22. There is no legal requirement that a deponent exhibits the instrument through which the company had given him the necessary authority.
23. It will be noted that in **MICROSOFT CORPORATION LTD VS MITSUMI COMPUTER GARAGE HCCC NO. 810 OF 2001**, Ringera J. had faulted the deponent, **PEARMAN**, for not stating that she had the authority of **MICROSOFT** to make the affidavit.
24. That case can therefore be distinguished from this case, in which the deponent expressly stated that he had the authority of the plaintiff to make the supporting affidavit.
25. As regards the quantum of the bitumen to be delivered by the defendant, the proof is to be found in the Proforma Invoices, Numbered **G/M 001** and **G/M002**.
26. G/M 001 is dated 10th November 2008, and is for 10,000 Kilogrammes of bitumen.
27. Meanwhile, **G/M 002** is dated 20th November 2008, and is for 400,000 kilogrammes of bitumen.

28. In the result, I find that the defence filed by the Defendant does not raise any triable issue. Accordingly, if it were to be sustained on the record, the defence would serve no useful purpose in determining the claims made by the Plaintiff.

29. Therefore, there is merit in the Plaintiff's application for the striking out of the Defence.

30. Accordingly, the Defence dated 9th September, 2009 is struck out forthwith. I now enter judgment in favour of the Plaintiff for Kshs.19,491,000/=. That sum will attract interest at Court Rates from 20th November 2008, until it is paid in full.

The costs of the suit and the costs of the application dated 29th September 2009 are awarded to the Plaintiff.

DATED, SIGNED and DELIVERED at NAIROBI this 18th day of January 2017.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Muchiri for the Plaintiff

No appearance for the Defendant

Collins Odhiambo – Court clerk