



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL & ADMIRALTY DIVISION**  
**CIVIL CASE NO 398 OF 2013**

**MOGAS KENYA LIMITED .....PLAINTIFF**

**VERSUS**

**PREMIUM PETROLEUM COMPANY LIMITED .....DEFENDANT**

**JUDGEMENT**

1. The Dispute herein arises out of the failure of Premium Petroleum Company Limited (the Defendant) to fully service a Contract for the Supply of 620 Cubic Meters (m3) of AGO Product otherwise known as Diesel at a cost of USD 848.0 per Cubic Meter to Mogas Kenya Ltd (the Plaintiff).

2. In the Amended Plaint dated 22<sup>nd</sup> February 2016 the Plaintiff sought the following orders:-

- a) The Product cost of 312 Cubic Meters (m3) of AGO (Diesel) at the rate of USD 848.0 per Cubic Meter (m3) making a total of USD 264,576.
- b) Loss profits at the rate of USD 50 per Cubic Meters of AGO making USD 15,600.
- c) Interest on financing cost a floor rate of 16% per annum (as per the Banking facility letter dated 18<sup>th</sup> May 2012) on 312m3 of AGO worth USD 264,576 making a total of Kshs.11,860,000.27 with the USD at Kshs.85.45, to finance the purchase of this volume of product from the Defendant).
- d) General damages for loss of brand Equity.
- e) Forex loss from June 2013 to end of January 2016 totaling Khs.4,461,161.45.
- f) Interest a,b,c and e above.
- g) Costs of the suit.

3. It is common ground that out of the Order for Supply of 620 Cubic Meters (m3), the Defendant only supplied 308 Cubic Meters leaving a balance of 312 Cubic Meters and it would not be surprising that at the commencement of the hearing on 27<sup>th</sup> September 2016 a Consent was entered in the following terms:

“By Consent,

1. Judgement be entered for the Plaintiff against the Defendant for the product cost of 312 cubic meters of AGO (Diesel) at the rate of 848 per cubic meter making a total of USD 264,576.

2. The Plaintiffs claim in Prayers b,c,d,f, and g in the amended Plaint proceed for full hearing and determination.

3. The Plaintiffs hereby abandon the claim for forex loss (so as to remove Prayer ( e) of the Amended Plaint).

4. Only the Plaintiff led evidence. This was by Partha Ghosh and Jemimah Gichure. They are the Managing Director and the Finance Manager, respectively, of the Company. The product was procured from the Defendant with a specific customer in mind that is Mogas Uganda Limited. Shown to Court was a Local Purchase Order dated 10<sup>th</sup> June 2013 in which Mogas Uganda Limited placed an order for purchase of 620 Cubic Meters of the Product at a unit price of USD 898 making a total of USD 556,760.

5. The evidence was that the Plaintiff was entitled to a profit at USD 50 per Cubic meter for the Product paid and not delivered.

6. Evidence was also led to the effect that the Working Capital of the Plaintiff Company was financed by Bank facilities with interest being charged on a daily basis. Produced as an exhibit was a Letter of Offer dated 18<sup>th</sup> May 2012 to the Plaintiff Company from Standard Chartered Bank Kenya Ltd for Banking facilities of a total of Kshs.629,000,000/=. Looking at the Letter of Offer the purpose of the facility was threefold:-

(i) To assist with Working Capital requirements and/or to finance the Company's Trading Assets.

(ii) For issuance of Custom Bonds and Guarantees in the ordinary course of business.

(iii) To enable the borrower purchase of Petroleum Products for resale in Kenya.

7. At the close of taking of evidence parties herein filed Written Submissions. In those Submissions, the parties each identified three issues deserving of determination. I have considered them and on my part see the following four:-

(i) Whether the Plaintiff is entitled to loss of profits.

(ii) Whether the Plaintiff is entitled to interest on financing cost.

(iii) Whether the Plaintiff is entitled to General Damages for loss of Brand Equity.

(iv) Whether the Plaintiff is entitled to Antecedent interest on the orders sought.

#### Loss of Profits

8. Under this head, the Plaintiff correctly proposed that Section 51 of The Sale of Goods Act would be relevant. It provides:-

(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.

9. The view of the Defendant is that there was no evidence in respect to two aspects:-

(i) Evidence to demonstrate that Mogas Uganda Limited cancelled the Local Purchase Order on account of breach by the Plaintiff.

(ii) Evidence of taxes and costs the Plaintiff was to incur on servicing the Local Purchase Order.

10. My understanding of the Provisions of Section 51(3) is that, **unless rebutted**, where there is available market for non-delivered goods, the measure of damages is 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. In this respect the Court considers the following evidence by PW1 in cross-examination to be singularly important,

***“We buy and sell the Product at a margin. We are claiming the margin. I can submit evidence of the margin but I do not have these documents today”.***

But as it turned out those documents were never produced.

11. This seems to be an admission by the Plaintiff that the expected profit was not simply the difference between the Contract Price with the Defendant and the Contract Price with Mogas Uganda. This was a rebuttal by the Plaintiff itself that it could not simply rely on Section 51(3). I would have to agree with the submissions by the Defendant’s Counsel that without evidence as to the costs to be incurred in servicing the LPO by Mogas Uganda the evidence adduced was not sufficient for the Court to assess the damages on Loss of Profit.

### **Interest on The Cost of Finance**

12. There was evidence that the Plaintiff had taken an overdraft facility to finance its Working Capital. This was a facility from Standard Chartered Bank (k) Ltd, which was made available to the Plaintiff through the Letter of Offer dated 18<sup>th</sup> May 2012. The evidence of Mr. Ghosh was that payment to the Defendant was made in two installments. The first for USD 262,880 and the second for USD 394320. The first payment was made from Standard Chartered Bank while the latter was from Equity Bank.

13. As to the basis for seeking interest on the Financing cost, the witness explained as follows. The payment to the Defendant was made through working capital financed by a bank. The finance is given at a cost as interest is charged. The witness then stated,

***“The Bank has continued to charge interest upto today on the finance given for the payment to the Defendant”.***

14. Prayer (c) of The Amended Plaint is fairly specific and reads:-

(c) Interest on financing cost at a floor rate of 16% per annum ( as per the Banking facility letter dated 18<sup>th</sup> May 2012) on 312m3 of AGO worth USD 264,576 making a total of Kshs.11,860,000.27 with the USD at Kshs.85.45, to finance the purchase of this volume of product from the Defendant)

15. In its submissions the Defendants argued that there was no evidence to proof, inter alia, that the Plaintiff paid a sum of Kshs.11,860,000.27 on account of interest for the sum financed.

16. The claim by the Plaintiff under this head is for the interest suffered on the Bank facility as a result of the undelivered product. It is not a claim for the interest on the amount paid for the undelivered product. It is for this reason that the Plaintiff was under an obligation to provide some evidence that as a result of

making the payment to the Defendant it suffered an interest charge to the Bank.

17. On the connection between the payment made from Equity Bank and the facility from Standard Chartered Bank, the witness stated,

***“Our Bank Statements would support the relationship between the Letter of Offer and the transfer. I do not have the Bank Statements here”.***

Those statements were never made available to court and clearly, the Plaintiff was unable to satisfactorily explain why interest under this head should be paid on the money paid out from Equity Bank.

18. The interest on the payment out of Standard Chartered seemed the easier to prove because, as stated earlier, there was evidence that the Bank had granted the Plaintiff an overdraft facility for its working capital requirements and/or to finance the company’s trading assets. Yet to be entitled to reimbursement of any interest that the Plaintiff may have suffered it needed to demonstrate that by purchasing the product it overdraw its account or that the non-service of the contract by the Defendant deprived the Plaintiff of some money that forced it to, either wholly or partially, overdraw its account for purposes of meeting its other obligations. And it would have been difficult, nay impossible, for the Plaintiff to demonstrate this without producing statements of its accounts with Standard Chartered for the material period. And so the Plaintiff let the opportunity go by failing to lay the relevant statements before Court.

#### General Damages for loss of Brand Equity

19. The Plaintiff neither led any evidence nor submitted on this leading of Damages. It would seem to have been abandoned.

#### Antecedent Interest

20. The Plaintiff prays for antecedent interest and asks this Court to following the hold in **Omega Enterprises (Kenya) Limited vs. Eldoret Sirikwa Hotel Ltd & Others** when the Court of Appeal held,

“There is no doubt that if a party is deprived of his money he must be compensated thereof by an award of interest thereon from the date he so deprived.”

21. The Court of Appeal has recently in **Barclays Bank Ltd vs. William Mwangi Ngaruki** [2014] eKLR affirmed the decision in **Highway Furniture Mark Limited vs. The Permanent Secretary & Another** [2006] eKLR as pronouncing the Law on interest antecedent to filing suit in this Country. In the latter case the Court of Appeal held,

“The justification for an award of interest on the principal sum is, generally speaking, to compensate a plaintiff for the deprivation of any money, or specific goods through the wrong act of a defendant. In Later v. Mbiyu [1965] EA 592, the forerunner of this Court said at page 593 paragraph E:

***“In both these cases the successful party was deprived of the use of goods or money by reason of the wrongful act on the part of the defendant, and in such a case it is clearly right that the party who has been deprived of the use of goods or money to which he is entitled should be compensated for such deprivation by the award of interest”.***

**(see also the Uganda case of Lwanga v Centenary Rural Development Bank [1999]1 ea 175)**

22. I must straightaway state that interest antecedent to the filing of the suit was not pleaded and was brought up in the submissions at the tail end of the proceedings. Having not been pleaded the same cannot be awarded.(Barclays Bank ltd (*supra*))

23. The outcome is that, following the consent of 27<sup>th</sup> September, 2016, the Plaintiff will have interest at

Court rates on the sum of US\$264,576 entered in its favour from the date of filing suit until payment in full. It shall also have costs on that amount.

**Dated, Signed and Delivered in Court at Nairobi this 17<sup>th</sup> day of February,2017.**

**F. TUIYOTT**

**JUDGE**

**PRESENT;**

Naitere for Plaintiff

Mirei for Bundotich for Defendant/Applicant

Alex - Court Clerk