



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO. 389 OF 2008

HASHI IMPEX LTD.....PLAINTIFF

VERSUS

DELTA HAULAGE SERVICES LTD.....DEFENDANT

JUDGMENT

1. This is a claim for payment of an alleged contractual sum, for payment of damages for breach of contract and for rescission of the “*Payments Agreement*” between the Parties.

2. The suit was commenced by a Plaint filed on 11th July 2008. Both Parties are limited companies acting through their principals and agents. Paragraphs 3 and 4 of the Plaint set out the original relationship between the Parties thus:

“3.At all material times to this suit, the Plaintiff was engaged in trade in petroleum products, including but not limited to the supply of the said products to its franchises in Uganda, Burudi and Congo. The Defendant in turn provided specialized transport services for the petroleum products.

*4.by an Agreement dated 1st September, 2007 (hereinafter the **Transport Agreement**”) the Plaintiff contracted the Defendant to transport its petroleum products from various destinations in Kenya to Bunjumbura and Burundi as and when the need arose.”*

3. Paragraph 6 avers that subsequent to the Transport Agreement, the Defendant approached the Plaintiff to ask for the supply of petroleum on Credit. The Plaintiff was also a supplier of petroleum products. The Parties reached an agreement and entered into a Memorandum of understanding dated 4th October 2007.

4. The Plaintiff also avers that it was a term of the Memorandum of Understanding that the Parties would, on a monthly basis reconcile and offset the petroleum products purchased against the services provided by the Defendant. It is said that over time the Defendant provided fewer services resulting in a net balance payable to the Plaintiff.

5. In its Defence the Defendant denied the above and put the Plaintiff to proof of the balance due and payable to the Plaintiff (para 8 of the Plaint).

6. In Paragraph 9 the Plaintiff alleged it was unable to recover the sums due and a Demand Note was sent because the Defendant withdrew its services and it was not therefore not able to recover the sums owing.

The Parties then entered into a Payment Agreement wherein the Defendant admitted owing the Plaintiff the sum of US\$112, 845.35. Paragraph 9 then goes on to set out the alleged proposal for payment.

“9. The Plaintiff avers that it was unable to recover the aforesaid outstanding amount because the Defendant, in breach of contract, withdrew the transport services agreed upon under the Transport Agreement. The Plaintiff thereupon issued and sent to the Defendant a written demand and notice of intention to file suit.”

9. The Defendant denied all the matters averred to in paragraphs 4-10 of the Plaintiff.

8. The Defendant then put its own case. It is accepted that there was an arrangement between the Parties where one provided transport services and the other petroleum products. It is averred that the Parties did enter into an arrangement to pay the amounts outstanding.

9. Paragraph 10 *et seq* of the Plaintiff sets out the Plaintiff's version of the Agreement to repay. It sets out that:

(1) The Amount outstanding as at 19th April 2008 was said to be US\$112, 845.35.

(ii) It was to be paid in two phases

a. By a past dated cheque of U\$39,047.62 to be Banked on maturity and the Defendant provided a cheque for KShs.2,460,000/- being the equivalent sum.

b. In relation to the balance of US\$73,979.73 the Defendant was to transfer a truck and trailer to the Plaintiff. The Truck was a Mercedes Benz Actros Reg. No. KAS 129Z and the Trailer was CMC Trailer 4 Axle Registration No. ZC 5803. The Defendant was to provide the paperwork to facilitate that transfer to the Plaintiff.

10. In its Defence, it is the Defendant's case that the Plaintiff unilaterally stopped the sale of petroleum. It is admitted that there was an agreement to pay outstanding amounts. It is also admitted that a cheque "was issued" and given to the Plaintiff. The Defendant then asked for it to be returned to correct an overpayment. The Plaintiff gives a different reason to do with insufficient funds. There is consensus that the cheque would be returned and the Defendant would make alternative payments. The Defendant did make the first payment of USD 16,000.00 but not the balance of USD 23,047.62. In addition the Plaintiff took possession of the Truck and Trailer as payment of the second part of the debt as set out in paragraph 10 (b) of the Plaintiff.

11. The Plaintiff did not return the cheque. It did instead on 7th June 2008 present it for payment. That action was pre-empted by the Defendant who had placed "a stop" on the cheque and on 13th June it was returned unpaid.

12. The plaintiff alleges that by stopping the Cheque the Defendant was in breach of fundamental term of the agreement to pay and that entitled the Plaintiff to rescind the Agreement and demand the full payment of amount owing. The plaintiff also sought to return the Truck and Trailer.

13. The Plaintiff claims that it demanded payment but paragraph 18 fails to provide a date for the Demand and Notice of Intention to sue neither are copies attached to the Plaintiff. The Plaintiff was filed on 11th July 2008, in other words less than one month after the cheque was returned unpaid.

14. The main issue between the Parties is whether the payment of USD 23,047.62 was dependant on the return of the cheque.

15. The Plaintiff asserts that the contract was rescinded and the Defendant given notice to take back its Truck and Trailer. However the Plaintiff's Supplementary list contains evidence of its attempts to auction

the same and also that it insured the same in its name. On 25th January 2011 the Truck and Trailer were sold and the proceeds paid to the Plaintiff.

16. By Chamber Summons dated 15th September 2008 (about 5 weeks after the Defence was filed) the Plaintiff sought Orders for Summary Judgment. In her Judgment Hon. Justice Joyce Khaminwa found that the Defendant admitted the debt of USD. 23,047.62 and therefore she found for the Plaintiff albeit recognizing that the undertaking to pay was consequent upon the return of the cheque according to the Defendant's case. A copy of that "Ruling" was very kindly provided by Counsel for the Plaintiff. The Preliminary Decree is undated but stamped on 5th February 2009. The issue then remaining for resolution relates to the balance of USD 73,797.73 set out in Paragraph 10(b) of the Plaint.

17. On 8th February 2012 the Plaintiff filed an Amended Plaint changing the sum claimed to Kshs.3,087,151.40. that appears to take into account the proceeds of the sale of the Truck and Trailer more than 12 months previously. Therefore the Plaintiff is now claiming the shortfall. In the Statement of Pauline Muthoni Ndungu at paragraph 7 it is said "*The Plaintiff subsequently auctioned the Truck and Trailer **given to it** by the defendant and obtained.....*". (**emphasis added**). The author describes herself as the Chief Accountant. The statement is quoted in Closing Submissions. From the Plaintiff's Supplementary List of Documents it seems that instructions for the sale were given in January 2010.

18. In fact the Chief Accountant did not attend to be cross-examine. The Plaintiff relies on her statement nevertheless. The matter was before the Court on various dates during late 2014 and early 2015. The Parties were directed to file written Submissions to aid early resolution given the age of the suit.

19. In Oral Submissions both Counsel confirmed that what they were litigating about was the difference. Miss Odari described it as " the difference between the cash paid and the cheque that bounced which she qualified as:

Original Sum USD 112,845.89

Cash paid USD 16,000.00

Judgment debt paid USD 23,047.62

USD 73,797.27

20. In fact, by the time the matter came before me on 20th November 2014, the Plaintiff had auctioned the Truck and Trailer and amended its Plaint accordingly. In the Amended Plaint the sum claimed is Kshs.3,087,131.40 which at the rate of KShs 66.90/- to the US\$1 equates to US\$.46,154.46.

21. The Defendant's case is that the matter is fully settled. It is admitted that as at 2007 the sum of USD 112,845.89 was outstanding. However the Defendant complied with the arrangement as set out in the "Repayment Agreement". The Cheque was issued and delivered and the Truck and Trailer were handed over. The Defendant then sought to exchange the cheque for cash which was paid by USD 16,000 and then the Judgment sum of US\$ 23,047.62. At the date of delivery the vehicles were valued at US\$ 73,797.73.

22. In response Counsel for the Plaintiff argued that the agreement was that the Truck and Trailer were to be security for the second payment of USD 73,797.73. It was argued that in any event the vehicles belonged to a third party. In addition it was argued that the Plaintiff had rescinded the Agreement and demanded the Truck and Trailer be collected.

23. The Court heard oral evidence from only the Plaintiff's first witness, Catherine Gathoni Kahika who said she works in the marketing Department and was involved in the transaction. However, in relation to one of the main planks of the Plaintiff's case, that is, the ownership of the Trucks, and whether the ownership was known at the start of the Agreement or was discovered subsequently by a search, she said

she was not privy to that information. In cross-examination she confirmed from the documents that the company that owned the Truck-Ameco Transport Agency was in fact beneficially owned by Mr. Ali M. Egal the Defendant company. In relation to the Letter of 29th May 2008 (page 64 Defendant's Bundle) she was not aware what happened in the matter "*was with the lawyers*". In relation to the figures and what was she was unable to answer. In fact her colleague never turned up to be cross-examined. The witness also confirmed that the vehicles belonged to Ameco, when in fact they had been sold more than 2 years previously. The witness was able to confirm that the Truck and Trailer remained in the possession of Plaintiff. The Plaintiff's witness was neither helpful nor plausible.

24. The Defendant called only one witness, Mr. Ali M. Egal who was a Director of the Defendant Company. He was cross-examined at length by Miss Odari of the Plaintiff.

25. Miss Odari reminded the witness that his testimony before Khaminwa J was that the Plaintiff knew the Defendant was not the owner of the vehicles. She then took him to the Letter dated 18th August 2010 at Page 19 of the Plaintiff's Documents where the Plaintiffs are said to have been surprised by that fact. The witness was then taken to the documents relating to Ameco and its shareholders. The gist of the questioning is that the vehicles were not good "*payment*". The Defence Witness also confirmed that he had received the letter asking the Defendant to take back the vehicles.

26. In re-examination the Defence Witness said that the vehicles were chosen by Mr. Hashi and valued. The registration documents were provided to the Plaintiff at the same time and it was only around 2010 when the issue of return was raised.

27. In relation to the individuals involved in the negotiations etc, Mr. Egal said he had dealt with Mr. Hashi. He said he never had any dealings with Catherine Gathoni. That was not challenged and to a certain extent was corroborated by the Plaintiff's Witness who had no personal knowledge of the facts and matters in issue.

28. I have read the parties Submissions and Authorities. I also heard oral argument by way of opening and highlighting of closing submissions. I heard oral evidence and considered the documents filed those referred to by the witnesses and the rest. In the circumstances I find as follows:

1. The Parties did enter into an agreement where the outstanding sum of US\$112,845.89 was to be paid by (a) a liquidated sum of US\$39,047.62 and (b) The transfer of two vehicles a Truck and Trailer as set out above valued at US\$75,797.23.

2. I find that the value of the vehicles was known and a deciding factor as the Parties went to the trouble of obtaining a valuation to confirm.

3. As to the liquidated sum, a post-dated cheque does not amount to payment. At best it is a promise to pay in the future. Therefore, there was no intrusion value to that particular cheque. The Defendant offered to and did make part payment in cash. He demanded it back and as out of caution stopped payment.

4. The Plaintiff accepted delivery of the vehicles and the Registration documents which clearly set out ownership at the time.

5. The Plaintiff also accepted the payment of US\$16,000.00 but refused and/or failed to return the cheque.

6. The Plaintiff attempted to obtain payment of the full sum of the cheque. Had it cleared that would have amounted to unjust enrichment.

7. The action of presenting the cheque while receiving alternative payment on the part of the Plaintiff's Directors and in particular Mr. Hashi shows bad faith.

8. The Plaintiff then brought this suit to recover the balance of the liquidated sum- which it was entitled and justified in doing.

9. Those acts demonstrate affirmation of the contract not rescission. It is not open to the Plaintiff to affirm part of an agreement and rescind the rest after 4 years or so.

10. The Parties had a bargain. The purpose of that was repayment of the Defendant's debt. Payment of US\$16,000.00 amounted to part performance as did the delivery up of the two identified vehicles. These were not random vehicles but specific vehicles chosen for their market value at the time.

29. It is clear the Plaintiff put these vehicles into its ownership and use not only because Mr. Egal's evidence is more reliable but also because the AA valuation dated 27th January 2011 and produced by Plaintiff refers to the Plaintiff as "*the insured*". That suggests there was an insurable interest at the very least asserted. There was nothing stopping the Plaintiff from returning the vehicles to the Defendant itself, but it did not do so.

30. In the Circumstances and for the reasons set out above, I find it was not open to the Plaintiff to rescind the benefit after part performance. In no part of the Plaintiff's case did it offer to properly rescind, i.e return the Parties to where they were before the contract. That demonstrates further, its lack of good faith.

31. I therefore dismiss the outstanding parts of the suit with costs.

32. I commend both Counsel for the hard work they put into this case and the hard work and courtesy they demonstrated.

Orders accordingly.

FARAH S.M. AMIN

JUDGE

Dated 10th November 2015.

Delivered 11th day of November 2015.

Coram

Farah S.M. Amin J

Mr. Kabugi CC

Miss Were HB MS Ondari

N/A for Defendant