



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 11 OF 2006

JOSEPH GITONGA NDIRANGU PLAINTIFF

-VERSUS-

TOTAL (K) LIMITED DEFENDANT

JUDGMENT

1. Plaintiff filed this case on 27th October 2000. It was partly heard before Justice Sergon, Justice Mohamed Ibrahim (as then was) and finally by Justice Mwongo. Since all those Judges are no longer at the Mombasa Law Courts the responsibility of writing the Judgment fell upon me even though I didn't hear any of the witnesses.

2. The Plaintiff's claim is as pleaded in the Amended Plaintiff. In that Plaintiff pleaded that on 24th October 2000 the Defendant, as it had done before, offered to sell to Plaintiff 50,000 litres of contaminated Jet A1 fuel at Kshs. 6/- per litre. Plaintiff accepted that offer and paid Kshs. 300,310/-. On payment 40,000 litres of that fuel was loaded to Plaintiff's vehicle. That the Defendant, however, after issuing Plaintiff with a gate pass, barred Plaintiff from removing from its premises the remaining 10,000 litres. Plaintiff therefore sought the following prayers-

- 1) Specific performance of the contract.**
- 2) Special damages**
 - (a) Loss of use of lorry Kshs. 20,000/- per day.**
 - (b) Loss of profit at Kshs. 32.50 per litre**
- 3) Damages for breach of contract**
- 4) Interest.**

3. Defendant filed a Defence and Counterclaim. Defendant denied that the agreement with the Plaintiff was for the sale of Jet A1 fuel, but that it was for sale of Fuel Oil 180 Sludge at Kshs. 6/- per litre. That by mistake, misrepresentation or fraud Plaintiff was on 23rd October 2000 supplied with Jet A1 Dead Stock/Kerosene instead of Sludge. Defendant pleaded further that such supply was as a result of

collusion with Defendant's ex-depot Manager, namely Isaiah Kiprof Chebii, who acted in excess of his authority. Defendant counterclaimed for Kshs. 503,814.00 which amount represented the difference in price of Sludge and Jet A1 fuel which was actually supplied to Plaintiff. Defendant also prayed for general damages.

4. Defendant did, with the leave of the Court, join Isaiah Kiprof Chebii as a Third Party but the said third party passed away before testifying and when this Court was finally reserved for its Judgment the suit against him had abated.

5. The parties filed in Court 20 issues for determination which in my view are unnecessarily expanded. The issues that I shall consider are-

1) Did Plaintiff and Defendant contract for the supply of 50,000 litres of Sledge or Jet A1 fuel?

2) What fuel was actually released to the Plaintiff?

3) Did the Defendant breach the contract? If yes, is Plaintiff entitled to prayers in the Plaintiff?

4) If Jet A1 fuel was released to the Plaintiff, is the Plaintiff liable to pay to the Defendant Kshs. 503,814/- and general damages?

6. I need to state that only the Plaintiff filed written submissions. The Learned Counsel for the Plaintiff attempted to give his own evidence in those submissions which evidence I will ignore.

7. On the first issue Plaintiff vacillated between stating that the product he contracted to buy from Defendant was Sludge and Jet A1 dead stock fuel. He stated in evidence in chief-

"The specific name given is Sludge which is the product which settles at bottom of tank ... I took possession of 30,000 litres of sludge."

Later Plaintiff stated still in chief-

"They were discussing on whether I should get back my money or the Jet A1 (dead stock)."

On being cross examined by Defendant Learned Counsels of Plaintiff and Third Party Plaintiff responded thus-

"I had paid [for] Jet A1 dead stock. The price was 32.50 contaminated Jet A1 is not the same as Fuel Oil 180 Sludge."

Although on being cross examined Plaintiff said the price he paid was Kshs. 32.50 he later on being re-examined by his Counsel said that Kshs. 32.50 was what he would have sold the fuel for.

8. Defendant's witness in evidence stated that the lorry carrying Plaintiff's product was impounded by Police because there was discrepancy between the product Plaintiff paid for and what was loaded. That what was in the lorry was Jet A1 fuel which was downgraded to appear as if it was Kerosene yet what was being sold to Plaintiff was black oil, Sludge.

9. I have considered the evidence adduced by Plaintiff and Defence witness and I have perused the exhibits before Court. Plaintiff exhibited invoices of his transactions with the Defendant dating from August to October 2000. The invoices are 14 in total. All those invoices describe in print form the product. Plaintiff was purchasing as **"Fuel Oil 180 Sludge."** It was not until the invoice of 24th October 2000, which is the subject of the present dispute, that the name of the product is shown as altered by hand. This is Plaintiff's Exhibit No. 4. The product description is altered by hand from Fuel Oil 180 Sludge to DPK Jet A1. Even though the invoice is so altered, the Defendant's Receipt for that invoice

which is also computer generated shows Plaintiff was actually purchasing Sludge. The Plaintiff did not explain why the invoice of 24th October 2000 was amended by hand and why the previous invoices which described the fuel as Sludge were not amended. It is important to note that the Third Party did write on a complementary slip dated 24th October 2000 addressed to Boston Industries, which Defendant stated was a firm of Plaintiff, that Plaintiff was to purchase 50,000 litres of Jet A1 Sludge product. See Defence Exhibit No. 4(b).

10. On a balance of probability I find that the Plaintiff and Defendant contracted for Plaintiff to buy Sludge and not Jet A1 fuel which was loaded for the Plaintiff.

11. The second issue is closely related to the first and I have responded to it when I stated that what was loaded for Plaintiff was Jet A1 fuel.

12. The third issue requires me to find if Plaintiff has proved Defendant breached the contract. The contract in accordance with the invoice and the receipt dated 24th October 2000 was for Plaintiff to be supplied with Sludge not Jet A1 fuel. I therefore find that there was no breach of contract as pleaded in the Plaintiff. The Plaintiff is not therefore entitled to a claim for specific performance of supply of Jet A1 fuel. The Plaintiff did not prove that the lorry left with the fuel at Defendant's premises was indeed owned by him or secondly that he suffered special damages as claimed in the Plaintiff. Plaintiff did not prove his claim of Kshs. 20,000/- per day as required in a claim for special damages. Special damages claim must specifically be pleaded and specifically proved. I rely on the decision of Justice Ngaah Jairo in the case **FRANCIS MUCHEE NTHIGA –Vs- DAVID N. WAWERU [2014]eKLR** where the Learned Judge stated-

“Talking of the need to plead and prove special damages the Court of Appeal sitting at Nairobi in Civil Appeal No. 180 of 1993 William Kiplangat Maritim & Another Versus Benson Omwenga cited with approval its earlier decision in Charles Sande versus Kenya Cooperative Creameries Ltd Civil Appeal No. 154 of 1992 (unreported) where it said:

“As we have pointed out at the beginning of this judgment Mr. Lakha readily agreed that these sums constituting the total amount were in the nature of special damages. They were not pleaded. It is now trite law that special damages must not only be pleaded but must also be specifically proved. We do not think we need to cite any authority for this simple and hackneyed proposition of law.” (underlining mine).

The Court also quoted its decision in Coast Bus Service Ltd versus Murunga Danyi & 2 Others Civil Appeal No. 192 of 1992 (unreported) where it stated-

“We would restate the position. Special damages must be pleaded with as much particularity as circumstances permit and in this connection, it is not enough to simply aver in the Plaintiff as was done in this case, that the particulars of special damages were to be supplied at the time of trial. If at the time of filing suit, the particulars of special damages were not known, then those particulars can only be supplied at the time of trial by amending the plaintiff to include the particulars which were previously missing. It is only when the particulars of the special damages are pleaded in the Plaintiff that a Claimant will be allowed to proceed to strict proof of those particulars ...”

13. Since I have found that Defendant did not breach its contract with Plaintiff, Plaintiff's claim for general damages fails.

14. On the fourth issue I find that the Defendant failed to prove the price applicable to the sale of Jet A1 fuel as opposed to Sludge. Defendant's witness acknowledged that failure when he stated under cross examination-

“I did not produce the price for the said days.”

It therefore follows that Defendant's Counter Claim fails for lack of proof.

15. In the end I find that each party failed to prove their respective case on a balance of probability. Accordingly Plaintiff's suit is dismissed with no orders as to costs and Defendant's Counter Claim is also dismissed with no orders to costs.

DATED and DELIVERED at MOMBASA this 6TH day of NOVEMBER, 2014.

MARY KASANGO

JUDGE