



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 16 OF 2014

ESSAR TELECOM KENYA LTD..... PLAINTIFF

• VERSUS -

KIUN COMMUNICATION LTD.....DEFENDANT

RULING

1. The plaintiff has asked the court to strike out the Defence and Counterclaim. Thereafter, the plaintiff wishes to have the court enter judgment in its favour, as prayed in the Plaint.
2. The application is premised on two grounds, being;
 - a. *That the defendant was truly indebted to the plaintiff because it did not deliver to the plaintiff 40 “Community Shelter Containers”, yet the defendant had been paid USD 522, 000 for the said containers.*
 - b. *The Defence was a bare denial, whilst the counterclaim was an afterthought. Therefore, those pleadings were scandalous, frivolous and vexatious. The pleadings were also an abuse of the process of the court.*
3. The claim herein emanates from a contract. Pursuant to that contract, the defendant was to deliver to the plaintiff, a total of 60 “Community Shelter Containers”.
4. The cost of the task assigned to the defendant was agreed at USD 826,000.
5. The plaintiff’s case was that the defendant delivered only 20 units, leaving a balance of 40 units.
6. Meanwhile, the plaintiff had paid for all the 60 units.
7. When the defendant failed to deliver the remaining 40 units, the plaintiff terminated the contract and then demanded a refund from the defendant.
8. But the defendant has denied having breached the contract. The defendant admitted that the plaintiff paid for all the 60 units. And the defendant insists that the units were delivered to the plaintiff, at Johannesburg.
9. Furthermore, the defendant indicated that it did collect the 20 containers on behalf of the plaintiff. The defendant then transported the said containers to various locations specified by the plaintiff. Once the 20 units were delivered to those locations, the defendant installed them.
10. It is in respect to those services that the defendant lodged a counterclaim, because the plaintiff had not paid the defendant.
11. In the Reply, to the Defence, the plaintiff stated that the 60 units of the “Community Shelter Containers” were to have been delivered by the defendant, to Nairobi. In effect, the alleged delivery to Johannesburg did not, in the opinion of the plaintiff, constitute a delivery.

12. Meanwhile, as regards the transportation of the 20 units, their wiring and installation, the plaintiff confirmed that the defendant undertook those tasks.
13. Nonetheless, the 20 units were said to have been installed in a manner that did not meet the specifications, thus rendering them unusable. For that reason, the plaintiff failed to pay the defendant.
14. I have given careful attention to the pleadings.
15. It is clear that the contract between the 2 parties was in respect to 60 “Community Shelter Containers”. The plaintiff was buying the 60 units from the defendant.
16. On the face of the written contract, there is no specification about the place where the defendant was supposed to make delivery. The contract document did not specify either Nairobi or Johannesburg as the place at which the delivery was to be made.
17. Therefore, when the plaintiff insists that the units were to be delivered at Nairobi, whilst the defendant said that 40 units were delivered at Johannesburg, I find that both parties may need to lead further evidence to prove their respective assertions.
18. Of course, it appears that the first 20 units were delivered to the plaintiff in Nairobi. If that is correct, then the defendant would have to demonstrate why the remaining 40 units were delivered to Johannesburg.
19. Meanwhile, as regards the terms for the payment of the units, the agreement was that the plaintiff would first pay 40% immediately after they placed the order. Thereafter, the balance was to be paid upon receipt of the consignment.
20. The defendant made payments through cheques as follows;

Amount (in USD)	<u>Date</u>
a. 331,200	9/9/2008
b. 150,000	5/12/2008
c. 100,000	18/2/2009
d. 50,000	3/4/2009
e. 180,917.07	13/5/2009
f. 15,882.93	<i>Offset from Defendant’s Account</i>

Total 828,000.00

21. The fact that the plaintiff continued to make payments until May 2009 prompted the defendant to say that that was confirmation that the plaintiff had received all the units. However, the plaintiff denied that assertion.
22. In the circumstances, the questions that the plaintiff may have to answer are;
 - i. *When did the plaintiff terminate the contract?*
 - ii. *As the balance of the purchase price was payable when the plaintiff had received the goods in issue, why did the plaintiff continue to make payments if the goods were not delivered by the defendant?*
23. On the question of the Counterclaim, the plaintiff confirmed that it had not paid the defendant for the transportation and installation of the 20 units.
24. Was the plaintiff justified to withhold the payment?
25. That is a question which must be answered after the parties lead evidence.
26. In effect, the Defence and Counterclaim are not bare denials. Secondly, the said pleadings are not frivolous, scandalous or vexatious, or in any other way an abuse of the process of the court.
27. I find no obvious and plain proof of the defendant’s alleged indebtedness to the plaintiff.
28. The Defence and the Counterclaim both raise triable issues. Therefore, the defendant is entitled to unconditional leave to defend itself. The defendant is also entitled to prosecute its counter-claim.
29. For those reasons, the application dated 19th May 2014 is without merit. It is therefore dismissed with costs.

DATED, SIGNED and DELIVERED at NAIROBI this 1st day of December 2014.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

.....for the Plaintiff.

.....for the Defendant.

Collins Odhiambo – Court clerk.