



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

CIVIL CASE 48 OF 2004

KARANJA MUCHIRI PLAINTIFF

VS.

PROCTOR AND ALLAN (E.A) LIMITEDDEFENDANT

JUDGMENT

By dint of a plaint dated and filed on 23rd December 2004, the plaintiff Karanja Muchiri claimed a sum of Kshs.8,405,200/20 being the value of cereals delivered to the defendant Proctor & Allan (E.A) Limited.

It is necessary to set out the paragraphs of the plaint that have a bearing on this claim. There are:

“3) On or about 16/6/2003 and on the immediate days thereafter, the defendant placed an order with the plaintiff to be supplied with several kilograms of cereals to wit, maize and soya beans for the defendant use.

4) The plaintiff acting on the order of the defendant company supplied the defendant with the said maize and soya beans which he duly delivered and was accepted by the defendant.

5) The plaintiff avers that the total value of the said cereals delivered to and accepted by the defendant is Kshs.8,405,200/20 now owing from the defendant to the plaintiff.

6) The plaintiff’s claim against the defendant is for payment of Kshs.8,405,200/20 being the value of maize and soya beans delivered to the defendant on diverse dates of 16/9/2003 to August, 2004 better particulars which are well known to the defendant.

7) The plaintiff further avers that despite several demands being made to the defendant to make good the debt it has failed, refused, and or ignored to do so, hence this suit.”

The defendant on the other hand denied the plaintiff’s claim and made a counterclaim for an overpayment said to have been made to the plaintiff. In the statement of amended defence and counterclaim dated 16th November 2005, the defendant admitted that it ordered from the plaintiff and the plaintiff agreed to supply to the defendant with certain quantities of specified cereals for the defendant’s business. The supply would be at prevailing market rates and paid for at that rate.

It is the defendant's case that, contrary to the stated terms of the agreement, the plaintiff in collusion with an employee of the defendant, fraudulently supplied cereals at extremely exaggerated prices and thereafter demanded payment.

The defendant then set out the particulars of fraud and collusion as follows:

- a) ***Supplying maize and claiming payment for soya beans which attracted a higher price.***
- b) ***Colluding with the said employee to alter documents to reflect supply of soya beans and claim payment instead of the maize supplied.***
- c) ***Claiming and receiving payment of rejected cereals.***
- d) ***Claiming and receiving double payments in respect of the same cereals supplied.***
- e) ***Claiming and receiving payment for cereals not supplied.***

The defendant then commenced a reconciliation of all the dealings with the plaintiff at the end of which, an overpayment of Kshs.13,950,835.76 to the plaintiff was revealed. That is the basis of the defendant's counter-claim against the plaintiff.

Under Order 10 rule 11A of the Civil Procedure Rules the parties exchanged documents before the trial commenced. The plaintiff gave evidence and called one David Mwangi Mukabi as PW2 in support of his pleadings. The evidence adduced by the Plaintiff and his witness was recorded by Lady Justice Karanja who was then transferred to another station.

I took over the proceedings under Order 17 rule 10 of the Civil Procedure Rules and proceeded to record the evidence of Victoria Wangari Muthusi, the only defence witness called by the defendant. Thereafter, I received written submissions prepared by both counsel for the plaintiff and the defendant for which I am most grateful.

I have had time to go through all the evidence on record including all the documents produced. I have also read the cited authorities.

The plaintiff's evidence was that he supplied the defendant with soya beans and recorded the same in a book he produced as exhibit 1. He supplied a total of 350 tons 310 kilograms. The defendant paid for 77 tons 430 kilograms leaving a balance of 272 tones 880 kilograms. That is what he was claiming. The agreed price was Kshs.43 per kilogram. The transaction was agreed upon following talks with the defendant's Managing Director one Anne Mbaabu.

The plaintiff was issued with weighbridge tickets after the weight of the produce was confirmed. He produced 23 such tickets as Exhibit 2. From his calculations, the amount owing for goods supplied but not paid for was Kshs.11,733,80/=. The sum claimed in the Plaint was based on the weighbridge tickets he had found at the time (of filing the suit).

The plaintiff caused a demand letter to be written by his lawyers to the defendant for a sum of Kshs.9,326,151 which he produced as Exhibit 3. It is his case that the defendant replied and acknowledged owing him Kshs.8,800,000/=. He had been paid for some goods supplied earlier but paid in the year 2004, the vouchers thereof were produced as Exhibit 4. On that basis he pleaded to the court to grant the orders sought.

Mr. David Mwangi Mubaki worked for the Plaintiff as his assistant and is the one who used to make deliveries of the goods ordered by the Defendant – at Nairobi. The procedure of delivering goods at the defendant's premises in Nairobi according to this witness was that, on arrival, the security personnel would confirm with the stores department if such an order existed. On confirmation the stores personnel would send lab staff to take a sample. They would then board the lorry and go to the weighbridge where

the goods were weighed. Thereafter a duplicate ticket was issued to PW2 – David Mwangi while the company retained the original. The goods are then offloaded into the defendant's stores but if the stores were full this would be done at the Cereal and Produce Board Stores. In his own words he said:

“The only documents we were given was a copy of the weighbridge which I would then bring to the Plaintiff. That was the same procedure we used to follow since year 2000. The cheques would then be sent to the Plaintiff. Problems started in year 2004. We would supply goods and then they would tell us they are waiting for their clients to pay them.

They then started paying us in instalments. I then learnt that they owed us 9 million. I do not know how much they have not paid so far.”

The plaintiff's case was tested on the foregoing evidence.

In defence and counter-claim, DW1 Victoria Wangari Muthusi gave evidence. She is the General Manager of the Defendant since 2004 but since 1996 when she joined the company to 2004 she was the quality controller. This witness took the court through the steps of placing orders for goods, all through to the payment stage. Her evidence though quite detailed can be summarized as follows:

She knew the plaintiff but did not deal with him as the former Managing Director was the contact person. She then explained in detail the delivery procedures in place at the defendants company. The weighbridge ticket would show the type of goods on board e.g. if the goods were soya beans the ticket would show this.

The net weight is then used to raise Goods Received Note (GRN) and a Local Purchase Order (LPO). The Company would retain a copy of the weighbridge ticket and a Duplicate issued to the supplier if he required it. In respect of the Goods Received Note, the company retains the originals and the supplier given a copy if he required it while the supplier got the Original Local Purchase Order and duplicate copies go to the accounts and stores departments.

Payments were made by cheque to the suppliers and these were supported by documents – weighbridge ticket, Goods Received note and Local Purchase Order and payment would be made against that.

At the initial sampling, where goods do not meet the specifications, the entire consignment would be rejected. In some cases, after goods have been passed at the offloading stage, further sampling would be done and any goods that do not meet the specifications would be returned to the suppliers.

In November, 2004, after the former Managing Director was asked to leave, some anomalies were discovered. There were instances where goods were rejected yet they were paid for and payments were made without supporting documents. Four days after the departure of the former Managing Director the plaintiff wrote his demand letter dated 4th September, 2004. It is the defendant's case that the demand was not accepted. The demand was not supported by any documentation and the plaintiff has never given or shown any documentation that he supplied any goods demanded in that letter.

DW1 then went on to produce D. Exhibit 1 being a summary of all payments for products by all their suppliers including the plaintiff. Between the years 2000 and 2004, the total payments made to the plaintiff added upto Kshs.123,397,672/65 while he supplied goods worth Kshs.115,410,605.06. The preliminary finding was that the plaintiff had received payments over and above the goods supplied. DW1 produced the documents marked DX 1 A, B, C and D to demonstrate this.

DW1 also said that commodity prices varied depending on the season, demand and supply. The statement by the plaintiff that the price of soya beans was kshs.43 per kilogram was therefore not the actual position.

Contrary to the Plaintiff's evidence that he supplied 350 tons 310 kilograms of products, the

defendants records showed a high figure of 373 tons 180 kilograms and according to DW1, the records the plaintiff seeks to rely on are not accurate. Additionally, weighbridge tickets do not necessarily prove delivery of goods to the company. The document that would conclusively confirm delivery would be a Goods Received Note or delivery note bearing the company stamp.

To demonstrate that the defendant did pay for the deliveries made by the plaintiff, the defence witness picked a detail in the plaintiff's evidence where he said on 21st April, 2004 he supplied 25 tons 90 kilograms of soya beans for which he was not paid. However DEX B last page bears an entry on 22nd April, 2004 against Goods Received Note No.9991 in respect of soya beans of the same weight at Kshs.34.50 per kilogram. A sum of Kshs.865,605/= made part of the total paid to the plaintiff.

The defence witness also produced DEX2 to show several payments paid to the plaintiff during the period he said the defendant paid him nothing. She also produced DEX3 being an account analysis for 18 items. Item No.6 was picked at random to demonstrate how documents were altered to the benefit of the plaintiff and loss to the defendant. At the end of it all, the defendant lost Kshs.13,950,835/75 which formed the basis of the counterclaim.

The plaintiff's claim is for special damages which, in addition to the same requiring to be specifically pleaded, must be proved. The demand letter dated 4th September, 2004 addressed to the defendant set the figure owing at Kshs.9,326,151/=. The Plaint filed on 23rd December, 2004 claimed a sum of kshs.8,405,200/20 while in his evidence in chief, the plaintiff told the court that the sum owed to him was Kshs.11,733,840/=. PW2 who used to make deliveries to the defendant on behalf of the plaintiff said that he learnt the defendant owed them Kshs.8 million. This was in his Evidence in Chief. In re-examination however he said the figure was over 9 million.

It is difficult to comprehend how a business of this magnitude cannot have corresponding documentary proof on the part of the party claiming to have been shortchanged by the other. One would also have expected that the plaintiff would maintain a record of all the relevant documents in the elaborate chain of deliveries upto payment of the products as explained by the defendant's witness. As one document cannot stand alone, going by the evidence of DW1, to facilitate payment, it cannot be true that the plaintiff was only given copies of the weighbridge tickets.

The defendant on the other hand has produced DEX1, DEX 2 and DEX3 to show that, one, there was a business relationship between it and the plaintiff, two, that relationship entailed supply and delivery of goods specified and three, those goods were paid for. Above all, on the documentary evidence, there was an overpayment to the plaintiff.

It is not enough for a party to plead figures then in evidence place them before the court and say this is my claim. Evidence is required to persuade the court why it should believe that party and disbelieve the other. The plaintiff has come out as an inconsistent litigant without any or adequate evidence to persuade this court to find in his favour.

On the other hand, the defendant has disapproved the plaintiff in every material particular and also established that it overpaid the plaintiff in the course of their business relationship. I agree, with respect, that is unjust enrichment and this court cannot allow the plaintiff to retain that benefit.

And so, in the end, I am persuaded that the plaintiff's suit against the defendant must fail and the same is dismissed with costs. On the other hand, I find that the defendant has proved its counterclaim against the plaintiff. I enter judgment against the plaintiff in the sum of Kshs.13,950,835.76 plus costs and interest.

Orders accordingly.

A. MBOGHOLI MSAGHA

JUDGE

Countersigned Dated and Delivered at Busia, this 5th day of October, 2009.

F. N. MUCHEMI

JUDGE