



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Civil Case 730 of 1991

KEN-U-TAN EXPORTS LTD.....

PLAINTIFF

-VERSUS-

LIKONI DEVELOPERS LTD.....DEFENDANT

JUDGMENT

The vital question with which I must grapple is whether Likoni Developers Limited hereinafter called Shakombo's Company (because Mr. Shakombo was the chief player on behalf of the company) acted as a mere agent of a disclosed principal, Mr. Wanani or whether it was a party to any enforceable contract with Ken-U-Tan Ltd. Hereinafter referred to as Adamjee's company (for the same reason). In this action for compensatory damages it is contended that Mr. Shakombo's company was in breach of the contract when it failed to supply Adamjee's company with the contract commodity. Was there breach of contract? Which contract? It behoves me to answer those questions.

Background facts

Essentially, there are two contract documents. I will inevitably consider each one and its implications.

But, first, I must give a brief portrait of each player in the drama, which culminated in this litigation. Adamjee is a veteran exporter dealing in various commodities such as pigeon peas and cottonseeds. He had done the business for 30 years. The commodity that concerns me in this suit is cottonseed. Shakombo had recently retired from a long stint in the civil service when he ventured into export and import business after incorporating the defendant company. During his civil service days he had interacted with Mr. Alex Thiiru who was then working with the Ministry of Industry in Nairobi. Thiiru was also an intimate friend of Adamjee. It is Thiiru who introduced Shakombo to Adamjee with the sole view that Shakombo would enable Adamjee to obtain a consignment of Tanzanian cottonseeds for export purpose. When Shakombo and Adamjee met on the 27th January 1991 they discussed how cottonseed would be acquired for Adamjee. In his evidence Shakombo said that he told Thiiru and Adamjee that he himself did not deal in cottonseeds but impressed upon them that his Tanzanian friend Mr. Wenani, of Wanani Exports and Imports Company Ltd could be contacted to sell cottonseeds to Adamjee.

The salient features of the subsequent events:

Adamjee's requirements are contained in his letter dated 2nd February 1991 to Mr. Shakombo (Pexh.1.). This document was signed by Adamjee and Shakombo and then by Mr. Wanani who signed as supplier

and shipper. According to Adamjee this document is the contract between him and Shakombo. The suit is in fact based on it. Shakombo in his evidence said he signed it as a mere co-coordinator in the sense that he would act as a linkman between the purchaser (Adamjee) and the supplier/shipper (Wanani). He denies that by his signature he became a party to the contract. But according to Adamjee Shakombo's signature on the document or any other similar document signified that he was to perform the contract i.e. ensure that the contract goods were delivered to him (Adamjee). Both parties made rival contentions on this subject and I will be constrained to consider these contentions in some detail. The next document is an invoice dated 11th February 1991 by Wanani & Imports Co. Ltd. The invoice was addressed to Mr. M.W. Adamjee. Its details correspond to the document (Pexh.1) issued by Mr. Adamjee to which I have referred above. It is instructive to remember that usually an invoice is a list of goods shipped or sent (or service performed) with prices or charges and it emanates from the seller to the purchaser. The question which arises is why would Wanani invoice Adamjee if according to the latter, his supplier would have been Shakombo? Would not he invoice have been directed to Shakombo, who in turn would have invoiced Adamjee?

The contract document dated 4th February 1991:

This was in a form of a letter from Adamjee to Wenani. Its copies are P.Exh 2 and Defence Exh. D5. It is necessary that I read the first paragraph:

We are pleased to advice you that on the receipt of the offer of 3000 M/T of the above commodity through our mutual friend Mr. S.R. Shakombo of Likoni Developers Ltd. Nairobi we passed the same to our clients overseas and the same has been accepted on the following conditions.

The question, which arises immediately, is why Shakombo's company could be alleged to have been in breach of the contract when this document explicitly shows that Shakombo had been a mere intermediary between the purchaser and supplier or else an agent of the supplier?

In this connection it should be noticed that a letter dated 13th February 1991 by Adamjee to the Central Bank of Kenya Mr. Adamjee did not clearly state the actual roles of Shakombo's company and Wanani's company. In paragraphs 1 and 2 he wrote:

We are hereby making a formal application to grant one of our bankers, namely the Habib Bank Ltd. P.o Box 83055, Mombasa an authority to open a BACK to BACK L/C in favour of 7/S WANANI EXPORTS & IMPORT CO. LTD of P.o Box 25231, Dar-es-salaam. In fact a contract has been signed between Likoni Developers Ltd of. P.o Box 30310 Nairobi and ourselves, as per attached copy, which has been also countersigned by M/S WANANI EXPORT & IMPORTS LTD. Of Dar-es-salaam.

What factors led to the debacle? And what are the pleadings?

D.W.2 is an official from the Board of External Trade Tanzania. He deposed that his country banned the export of cotton seeds due to adverse condition, which rendered the commodity insufficient for the local market. He said:

“The ban was directed to the exporters. They would not export cotton for that reason.”

Ultimately Wanani could not avail the cotton seeds. Adamjee received the message on this aspect on the 28th April 1991. In paragraph 4 of the plaint the plaintiff averred:

The defendant (Shakombo's company) failed to supply to the plaintiffs the cottonseeds to be supplied under the said contract. In consequence of the said breach of the contract the plaintiff has suffered loss and damage.

Particulars of loss and damage:

Amount due to the plaintiff's buyers, settled with the said buyers @ 12 US dollars per metric ton US\$/36000

Plaintiffs loss of profits on the said sale @ 10.50 US dollars per metric ton.

But the vital question is whether the defendant is on the disclosed facts liable?

The defence is that the plaintiff cannot hold the defendant liable on the contract dated 2nd February 1991 because it (that contract) was superceded by the contract of 4th February 1991. I have already discussed this aspect. Now I should examine the salient aspects of the plaintiff's evidence on this aspect. In his own evidence Adamjee sought to convey the impression that the contract of 4th February 1991 with Wanani was prompted by Shakombo's financial difficulty, and that it was for the sole purpose of opening a letter of credit to Wanani. I find the following exchange between Mr.Simani, counsel for the defendant, and Adamjee quite crucial.

Q: In other words Mr. Shakombo informed you that he was penniless or had not capacity to purchase the cottonseeds nor did he have in his possession of cottonseeds.

A: Mr. Shakombo told me that he did not have the capacity to open a back to back L.C in favour of Wanani Import and Export. So I had to make a contract with Wanani for the purpose of opening the L.C

Q: Do you have proof in writing that Exh. D5 was only for the purpose of opening an L.C.

A: I have no proof.

Q: Why did you not simply help Shakombo by giving him money or a bank guarantee for the purpose of purchasing the goods from Wanani?

A: I would not trust him financially. I would not give him a guarantee. I do not trust him at all. Not with money!

Mr. Adamjee went on to state and assert:

So I am saying that the only value in this agreement (Exh.D5) is that it would enable the opening of the L.C. to Wanani. That is the only value in it when I opened the L.C. direct to Wanani it was merely to assist Mr.Shakombo's company, but as far as I was concerned the supplier was Mr.Shakombo's company.

But late Adamjee conceded one thing when he said:

I see Exh. D5. Looked at; it is an independent contract between me and Wanani to supply 3600 metric tons of cotton seed.

CONCLUSIONS:

In evaluating this evidence in the light of the issues framed two things are crystal clear:

(a) From inception it was obvious to Adamjee that Shakombo neither had the cotton seeds nor the required financial capacity to enable him effect the supply of the cotton seeds to him (Adamjee). In those circumstances the contract with Shakombo alone would have been an exercise in absolute futility. It was plain to Adamjee that Shakombo was incapable of performing his part of the contract.

(b) Because Adamjee clearly knew the handicap or weak circumstances of Shakombo he sought to deal directly with Wanani. In my view, Shakombo's role was then diminished to that of an intermediary or co-coordinator who would have earned a commission.

I find as a fact that if the document executed on the 2nd February 1991 (Exh.1) was a contract at all then it was immediately superceded by the one dated 4th February 1991 (Exh.D5). Thus the contract of 2nd February became no longer enforceable.

But these findings notwithstanding, it is quite evident that Wanani (or for that matter Shakombo's) failure to perform the contract was solely as a result of a supervening illegality under the Tanzanian system. It has been amply canvassed and demonstrated that the government's ban of the export of cotton seed was in subsistence at the time of the contract. In the present case the ban was undoubtedly effected by a subsidiary legislation. In the case of Baily v. Crespigny [1867] L.R. 4 Q-B a lessor was held not liable for an alleged breach of a covenant that neither he nor his assigns would build on a piece of land adjoining the demised premises, when the railways company, under the powers derived from a subsequent statute, compulsorily acquired the land and erected a station on it. In delivering the judgment of the court Hannen J. said:

The legislature by compelling him to part with his land to the railways company whom he could not have bound by any stipulation, as he could an assignee chosen by himself, has created a new kind of assign, such as was not in contemplation of the parties when the contract was entered into. To hold the defendant responsible for the acts such an assignee is to make an entirely new contract for the parties.

(This case has been uplifted from Chitty on Contract-General Principles-26th Edn at para 1647 at p. 1028)

For all these reasons I hold that the defendant in the instant case is not liable. Accordingly, the suit is dismissed with costs.

Dated and delivered on the 21st January 1995

I.C.C. WAMBILYANGAH

JUDGE