IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: E. M.GITHINJI, HANNAH OKWENGU & J.MOHAMMED, JJ.A)

CIVIL APPEAL NO. 115 OF 2012

BETWEEN

VALENTINO'S FOOTWEAR MANUFACTURERS LTD...APPELLANT

AND

BATA SHOE COMPANY LIMITED.....RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Nairobi ***(K.H. Rawal, J.),***

dated 25th October, 2011 **in H.C.C.C No. 3558 of 1989)**

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JUDGMENT OF THE COURT

1. This appeal originates from a suit that was filed in the High Court by **Valentino's Footwear Manufacturers Ltd** (appellant), seeking judgement against **Bata Shoe Company Limited** (respondent), for general damages for breach of contract and loss of goodwill, and a sum of Kshs. 13,392,109.60 (thirteen million three hundred and ninety-two thousand and one hundred and nine shillings, cents sixty) being loss of revenue and profits. The suit was premised on the grounds that the respondent had breached an Exclusive Manufacturing Agreement (hereinafter referred to as the 'contract') dated 14th June 1988 that was entered into between the appellant and the respondent. The contract required the appellant to exclusively manufacture various types of ladies shoes for the respondent (hereinafter referred to as the 'contract goods').

2. The appellant pleaded that the respondent had unlawfully breached specific terms of the contract by, amongst other things, failing: to order sufficient contract goods; to supply any/or sufficient raw materials; to pay sufficient consideration as envisioned in **clause 8** of the contract; and that the respondent improperly and without notice changed the designs for the contract goods which resulted in delay in production; and that as a result the appellant suffered loss and was unable to meet its overheads.

3. The respondent filed an amended statement of defence denying all the appellant's allegations. The respondent alleged that the appellant did not have capacity to manufacture the contract goods as agreed as it was placed under receivership; that the appellant was responsible for obtaining all necessary documentation, permits, and foreign exchange allocation in connection with the importation of the raw materials required for the implementation of the contract, but failed to do so, and that, consequently, no raw material was imported. In addition, the respondent alleged that since the agreed consideration was to be based on the factory price of the finished contract goods, and no production of the goods took place, there was no way of determining the consideration or the profit margin. The respondent denied that the appellant suffered financial loss or loss of business good will as alleged.

4. During the hearing of the suit the appellant called two witnesses. The first witness was the appellant's Managing Director Martin Wainaina Kinyanjui, who produced the "Exclusive Manufacturing Agreement" entered into between the appellant and the respondent. The witness explained that the obligation of the appellant included applying for and obtaining import license for raw materials; that at the commencement of the contract the appellant had in stock a lot of the raw materials but these were surrendered to the respondent who was then to supply the raw materials to the appellant as and when required in accordance with their orders; that the respondent did not supply the raw materials as required, and this resulted in delay in production; that for the same reason the appellant supplied goods that were less than its capacity; that the costing and profit percentage was not agreed upon and the same was done to the appellant's disadvantage; and that all these factors resulted in loss of revenue and profits suffered by the plaintiff of Kshs.13,392,109/60.

5. The second witness called by the appellant was Christopher Kiovi a certified Public Accountant cum Auditor. This witness produced a report dated 21st July 2010 that was prepared by his firm "Njuguna Kiai and Associates" following instructions given by the appellant.

Under cross-examination, this witness conceded that he did not at any time look at the accounts for the appellant for the years 1986-1989. He explained that his assignment was not to audit the appellant's business.

6. The respondent testified through its Costing and Efficiency Manager one Michael Kipkorir Rutto who joined the company in February 1995. The witness conceded that he was not working with the company between 1987 and 1988 but maintained that he was able to testify using the records in the respondent's possession. The witness stated that the basis of the contract entered into between the appellant and the respondent was that the appellant had the ability to procure import license and foreign exchange to import the raw material required for the production of the contract goods; that there was no evidence that the appellant obtained any foreign exchange acquisition or import license; that the appellant failed to comply with the terms of the contract; that although some goods were supplied to the respondent these were not the contract goods; and that that in the absence of the supply of contract goods, it was difficult to determine the production cost or the profit margin.

7. Upon considering the evidence adduced, and the submissions made by counsel, the trial judge (Rawal J. as she then was), found that the appellant had failed to obtain the import license required for importing the raw materials; that the appellant was unable to show that it had sought for the requisitioned goods or that it had ordered for the required raw products; that the appellant had failed to prove that the respondent was liable to pay damages under the contract; and that the appellant had failed to specifically prove the special damages that it claimed.

Consequently, the trial judge concluded that the appellant had failed to prove his claim and therefore dismissed the appellant's suit.

8. It is that decision that provoked the current appeal. In its memorandum of appeal the appellant has raised 10 grounds. These include the contention that the learned judge erred in law and fact in: failing to find that the respondent breached the contract; failing to consider that there was no need for the appellant to procure an import licence as respondent did not make orders that required the importation of raw materials; failing to find that the respondent's breach of the contract directly resulted in loss to the appellant to the tune of Kshs. 13, 392, 109.60; and failing to find that the appellant proved its case on a balance of probabilities.

9. During the hearing of the appeal, Mr. B.N Ngugi appeared for the appellant, while Mr. Geoffrey Obura appeared for the respondent. Following directions given by the Court in consultation with the parties' advocates, written submissions were duly filed and exchanged between the parties, and these were subsequently orally highlighted in Court.

10. It was submitted on behalf of the appellant that the contract was entered into following negotiations in which certain understandings were arrived at and that the contract and the clause that the appellant was to use its plant solely for the purpose of manufacturing the contract goods must be understood within this context. It was argued that what was clear from the negotiations was that the respondent was to keep the appellant busy by giving sufficient orders to cater for the appellant's full capacity and the output capacity as discussed; that this intention was reflected in **clause 3 (a)** of the contract; that the respondent was to take possession of all raw materials (import and local) that was previously held by the appellant, and supply the required amount of raw materials to the appellant as per the orders made by the appellant and that the trial judge erred in finding that there was no evidence adduced by the appellant to prove that any order was made by the respondent during the term of the contract, as the correct position was that the respondent placed orders for the contract goods but the same was not sufficient to cover the appellant's output.

11. Further, it was postulated that the accounts tabulated by the appellant in support of the claim was based on its full capacity production as envisaged in **clause 8;** that the contract did not provide timelines for the procurement of import license; that in any case the respondent could not rely on the 'condition precedent' as the reason why the respondent could not perform its obligation as there was no time during the contract that the respondent gave orders that could not be satisfied due to lack of import of raw materials.

12. Finally, it was argued for the appellant that the loss claimed by the appellant was specifically pleaded through the accounts that were tabulated; that the loss was uncontroverted by the respondent; and that under the principle of "***restitutio integrum"*** the appellant was entitled to damages as would as nearly as possible put them in the same position as if the contract had not been breached. The court was therefore urged to find that the appellant had established that the respondent was in breach of the contract, that as a result it suffered losses in production, in revenue and in profits; and that the appellant's suit ought not to have been dismissed.

13. For the respondent, it was argued that the appellant failed to discharge the burden of proof; that the appellant ought to have proved that it satisfied its obligation under the contract by obtaining licenses and importing raw materials; that the raw materials ought to have been surrendered to the respondent to enable the respondent release them to the appellant in accordance with appropriate orders issued by the appellant from time to time to facilitate the manufacture of the contract goods; that no such raw materials were surrendered to the respondent; and that the appellant's failure to obtain the import licenses could not be excused through negotiations agreed upon at the time of entering the contract.

14. Counsel for the respondent pointed out that although **clause 8** of the agreement provided for consideration, there was no basis upon which the parties could invoke that clause as the appellant failed to manufacture the contract goods, and therefore the appellant's claim for Kshs.13,392,09.00 was not specifically proven. Counsel submitted that the fact that the appellant opted to manufacture the contract goods from materials available locally was an indication that the appellant was unable to secure the said license. This was evident from the appellant's letter dated 10th February, 1989 wherein the appellant stated that it could still manufacture the contract goods using locally available materials.

15. Counsel for the respondent asserted that **clause 5(a)** of the agreement was a condition precedent to be satisfied before the respondent could be called upon to perform its obligation under **clause 3(a)**; that as the appellant claimed that the performance of the condition did not have a specific time line, it could not expect the respondent to perform its obligation as per the agreement; that the appellant's contention contained in its letter dated 27th April, 1988 that it had existing import license which could be utilized in the performance of the contract was not practical since the said license was for the importation of profolex which was not a raw material required for the manufacture of the

contract goods; and that in any case the said license expired in July 1988 the same month that the contract was supposed to take effect.

16. In addition, it was submitted that the appellant failed to show how it arrived at the figure of Kshs. 16,659,353.65 as the contract did not provide for the manner of fixing the profit margin; that the auditor called by the appellant as a witness could not substantiate the figures tabulated by the appellant at the trial, as he was not the one who prepared them. The Court was therefore urged to uphold the judgment of the trial court as the appellant failed to prove its case on a balance of probability.

17. We have carefully considered this appeal and the evidence that was adduced before the learned judge, as well as the submissions made before us and the authorities cited. This being a first appeal, we are enjoined to follow and apply the principle of law as stated in **Watt v Thomas [1947] AC 484** and adopted by Madan JA in ***Mary Njoki vs. John Kinyanjui Mutheru & Others [1985] eKLR*** as follows*:*

> **"Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight of bearing circumstances admitted or proved, or has plainly gone wrong the appellate court will not hesitate to decide."**

18. With the above in mind, we have considered this appeal and the submissions made before us. We find that it is not disputed that there were negotiations entered into between the appellant and the respondent that resulted in the contract. This contract required the appellant to exclusively use its manufacturing plant for the manufacture of agreed contract goods exclusively for the respondent. The contract was a written contract and therefore the specific clauses agreed upon are evident on the document. A dispute has however arisen concerning the interpretation of the contract particularly with regard to clause 3(a) and 5(a).

19. Other issues that we have identified for determination in this appeal are: whether **clause 5(a)** was a condition precedent to the respondent fulfilling its obligation; whether the appellant's expectation to receive sufficient orders and consideration from the respondent was equitable; whether the appellant incurred losses as a result of the respondent's alleged failure in fulfilling its obligations under the agreement; and whether the appellant proved its case on a balance of probabilities.

20. It appropriate that we commence our analysis by examining clause 3(a) and clause 5(a) of the contract. These clauses stated as follows:

> **3(a) "Valentinos undertakes to meet all orders for the Contract Goods placed by Bata (so far as its manufacturing capacity allows) and Bata undertakes that subject as hereinafter provided Bata will purchase from Valentinos its full output of the Contract Goods. For the purposes of this Clause Bata will keep Valentinos informed in advance of its anticipated requirements of the Contract Goods;"**
>
> **"5. So long as this agreement continues Valentinos shall be solely responsible for:-**
>
> > **a. Applying for, obtaining and using all necessary import permits and foreign exchange allocations necessary for the importation of any materials required for the manufacture of the Contract Goods which have to be imported into Kenya subject to the availability of the import license"**

21. The appellant testified that in reliance on clause 3(a) of the contract, it expected to receive orders from the respondent to their maximum capacity which was a minimum of 500 shoes a day. Since the said agreement (Clause 2) provided that the appellant shall exclusively manufacture goods solely for the respondent, the appellant expected that it would get enough business to cover its overheads as well as make profits. It is this expectation that led the appellant to take a loan of Kenya Kshs.13,500,000.00 from Development Finance Company of Kenya; and increase its workforce capacity in readiness for the work. The appellant relied on a letter from the respondent dated 1st

December 1988 wherein the respondent assured the appellant that it would provide sufficient production such as to enable it pay back its interests and capital loans.

22. In ***National Bank Kenya Limited vs. Pipeplastic Samkolit (K) Ltd & another [2001] KLR***: this Court held that a court of law cannot re-write a contract between parties and therefore unless coercion, fraud and undue influence are pleaded and proved, the parties are bound by the terms of their contract. Applying this to the circumstances before us the appellant and the respondent were bound by the terms of the contract. Indeed, by the appellant's own admission the contract was as a result of negotiations that were agreed upon and condensed into the written contract. Besides, the letter of 1st December 1988 was written 6 months into the contract, and therefore, the appellant cannot purport to rely on it as a basis for its expectation since the said words were not written at the time or prior to entering into the contract.

23. The wording of clause 3(a) of the contract reveals that the respondent entered into an obligation to purchase from the appellant its full output of the contract goods. This gave the appellant a basis to expect orders that matched its full capacity as was clearly indicated in the quoted clause. Therefore, it was acceptable for them to expect that the profits made from the production at its full capacity on a daily basis was going to be enough to meet its over heads and still give them a reasonable profit. However, the same clause 3(a) contains the words ***"subject as hereinafter provided"*** meaning that before the said order being placed by the respondent, certain condition(s) had to be met by the appellant. This is where clause 5(a) becomes relevant.

23. We have considered the respondent's contention that **clause 5(a)** of the contract was a condition precedent to the performance of its contractual obligation, and the respondent's contrary contention. In our view, a plain reading of clause 5(a) that we have reproduced above (paragraph 20) reveals that no production of the contract goods could be done until the raw materials were imported. It is also clear that the obligation to get foreign exchange and an importation license was on the appellant, and the respondent only had the obligation as per clause 6(a) to provide finances and store the imported raw materials.

24. Therefore, the anticipated chronological order of events resulting in the performance of the contract was that the appellant had to obtain the import licence and foreign exchange allocation; get financing from the respondent; import the raw materials; hand over the raw materials to the respondent for storage; and thereafter, order for raw materials from the respondent as and when required; and it is only then that the raw materials could be supplied to the appellant for purposes of manufacturing the contracted goods. Consequently, the appellant had to set the ball rolling by complying with the condition of getting the import license and foreign allocations. The appellant having failed in this regard, the respondent cannot be blamed for failing to supply the raw materials or giving orders for the contract goods.

25. On the issue of consideration, the respondent maintained that it did not have to pay the appellant any consideration, as the appellant did not produce the contract goods. In this regard we refer to **Clause 8** of the contract that clearly provided for consideration in exchange for contract goods that meet the respondent's quality requirement. This means that the contract goods were to be the goods manufactured using the specific imported raw materials that the appellant was required to import, but which the appellant failed to import.

26. Under clause 8 of the agreement the respondent was obligated to:

> **"….. pay to Valentinos the factory price of finished contract goods which meet Batas quality requirements calculated in such a way that the price will cover all reasonable production expenses incurred by Valentinos in manufacturing the Goods and provide a percentage profit margin per pair of shoes calculated on a basis agreed by Bata and Valentinos for each style of shoe to be manufactured. In calculating the price to be paid by Bata for the contract goods the cost of all materials supplied by Bata shall be deducted from the overall production expenses referred to above so that Bata is not charged for the cost of such materials."**

27. During the hearing, the appellant relied on tabulated accounts in support of its claim for loss of profits and revenue. According to the accounts, the figure of Kshs. 16, 659, 353.65, that was arrived at was the projection anticipated from the manufacture of the contract goods at full capacity. However, the figures were not anchored on anything tangible as no production actually took place, and the respondent cannot be blamed for this failure. We reiterate the sentiments expressed by this Court in ***Five Continents Ltd vs. Mpata Investments Ltd [2003] 1 EA*** in rejecting accounts analysis such as what was produced by the appellant's witness in this matter, that:

> **"The plaintiff mainly relied on the accounts analysis to show the defendant's indebtedness. That accounts analysis was apparently prepared by the plaintiff for use in this suit. It is not itself a book of account regularly kept in the course of business. Even if it were, such a statement would not alone be sufficient evidence to charge the defendant with liability"**

28. Needless to state that the accounts relied upon by the appellant were not of much use in advancing his case. It is also evident that the respondent opted to give the appellant alternative work in order to keep it afloat. This is apparent from the respondent's letter dated 1st December 1988 where the respondent stated:

> **"As far as our agreement is concerned, we are willing to co-operate and give you as much assistance as we can, but on your side, we do not seem to have much success. First of all, you did not obtain the materials you promised to import in order to maintain continuous work. We are making every effort to provide you with work, even at the cost of reducing our own production to make sure that you have something to do. We are also trying to find alternatives to give you only uppers for the time being but, in case you cannot get the components (heels) needed to finish the shoes we will be obliged to stop providing you with work."**

30. It is worth noting that **clause 6(b)** provided for supply of both imported and locally available raw materials. The appellant claimed that it had some local raw materials, but the respondent countered that the material was not the one required for manufacture of the contract goods. In this regard, both local and imported material that were to be used for the manufacture of the contract goods were to be surrendered to the respondent and subsequently supplied by the respondent as required. The appellant did not explain the origin of the local material in its possession or why the same had not been surrendered to the respondent if indeed the same was to be used for production of the contract goods. Therefore, we are not satisfied that the local materials that was in the respondent's possession, were the ones required for the manufacture of the contract goods. In addition, from the tone of the appellant's letter dated 10th February 1989, the appellant was either unable or did not bother to obtain the necessary licence. That letter read in part as follows:

> **".....Thirdly and most importantly is that we have in the past made ladies shoes of the materials available locally and we expect that our production would continue in full capacity using such materials…."**

31. We come to the conclusion that the appellant failed to meet its obligation to import the raw materials and this was a condition precedent, which rendered the entire contract unenforceable. In the circumstances, the trial Judge cannot be faulted for dismissing the appellant's suit. Accordingly, we find no merit in this appeal and do therefore dismiss it with costs.

DATED and Delivered at Nairobi this 12th day of October, 2018

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR