IN THE COURT OF APPEAL
AT NAIROBI
CORAM: KWACH, SHAH & KEIWUA, JJ.A
CIVIL APPEAL NO. 290 OF 2000

BETWEEN

B.A.T. KENYA LIMITED ..... APPELLANT

AND

MEA LIMITED.....RESPONDENT

(Appeal from the judgment and decree of the High Court of Kenya at Nakuru (Rimita, J) dated 19th January, 1999

in

H.C.C.C. NO. 337 OF 1995)
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JUDGMENT OF THE COURT

B.A.T. Kenya Limited, (the appellant) wanted to buy certain fertilizer from *MEA Limited* (the respondent). The fertilizer the appellant wanted to purchase was N.P.K. 6:18:20 + 4MGO + 0.1% Boran. We will hereafter refer to the same simply as "the fertilizer". The appellant sought from the respondent a quotation for 2000 metric tonnes of the fertilizer. The respondent quoted the price in U.S. Dollars being 345 US.$ per tonne. Whilst so quoting the respondent said in its letter of 3rd July, 1992 to the appellant.

> *"As you will note we have quoted to you in U.S. Dollars although we shall expect you to pay us in Kenya shillings at the of ficial Central Bank Exchange rate that will be operating when settling the accounts. This has been necessitated by the current uncertain situation in foreign exchange rate fluctuations."*

The appellant replied to the quotation of 3rd July, 1992 by its letter of 13th July, 1992. It said:

> *"We would like to discuss this further with you and your chairman. We particularly feel that the price you quoted in U.S. Dollars is on the high side, and we would like the transaction to be in Kenya shillings since we are all locally based."*

By its fax message the respondent offered the fertilizer (2500 tonnes) to the appellant at a price of Shs.12,350/- per metric tonne ex-Nakuru. It put the exchange rate at Kshs.32/50 to the dollar and added that any change in exchange rate of over Kshs.1/- had to be on the appellant's account. There were further discussions between the parties when by its letter of 8th September, 1992 the respondent changed its offer and stated:

"Further to our various discussion on the above su bject, we have reviewed our offer once again and confirm our offer at Kshs.604/75 per bag of 50 Kg Ex -factory at Nakuru.

All other terms and conditions remain the same.

As the Kenya Shilling continues to depreciate against the $, we hope to hear from you rself at your earliest convenience."

The appellant accepted the offer contained in the said letter of 8th September, 1992 by its letter of 11th September, 1992 which letter so far as material reads:

"This is, therefore, to advise you that the company ha s agreed to offer you this tender to supply 2000 metric tonnes of this fertilizer at a price of Kshs.604/75 per 50 Kg. bag ex your factory at Nakuru.

As you probably know we would like this fertilizer to be supplied during the month of November, 1992 such that all deliveries will have been completed by 1st December, 1992.

Whilst awaiting our L.P.O. which is under preparation you may wish to start preparations for the blending of this fertilizers in order to meet the target supply period."

The acceptance contained in the said letter of 11th September, 1992 was confirmed on the same day by an award of the contract to the respondent. It is noteworthy that nowhere in that letter of confirmation the appellant talked of or referred to any price in US Dollars. The respondent supplied the agreed quantity of the fertilizer. The appellant had sought delivery of all fertilizer during November, 1992. In addition to the ex-Nakuru price the appellant agreed to pay costs of transportation of the fertilizer froM Nakuru to its other leaf centres. It is on record that the fertilizer was supplied and paid for in Kenya shillings as follows:

1. Shs. 8,897,082/00 paid on 21st January, 1993.

2. Shs. 5,388,322/50 paid on 10th February, 1993.

3. Shs. 4,173,379/75 paid on 27th January, 1992.

4. Shs. 280,624/20 paid on 21st January, 1993.

5. Shs. 549,738/70 paid on 21st January, 1993

The above figures make a total of Shs. 19,289,147/50. The sum paid includes transport charges already referred to by us.

By its letter of 29th March, 1993 the respondent raised the issue of upward fluctuation of the value of U.S. $ against Kenya Shilling. By reference to its fax No. 108/92 dated 4th August, 1992 the respondent stated that it was "plainly clear that the agreed price per ton was based on the then existing exchange rate of Shs.32/50 per U.S.$ and that any upward fluctuation of more than Shs.1/= per U.S. $ was to the account of the appellant". In that letter it added:

"It is therefore with deep regret that it so happened that by ***the time the L.C. for the ingredients used to make the above blend fell due, far reaching changes had taken place ont he foreign exchange market. In fact although the L.C. was due on 17.02.93 our bankers were not able to settle the same until one month later due to non -provision of foreign exchange by the Central bank.***

Eventually they were forced to buy the currency with which to settle the L.C. from the inter - bank market (see photostat copy of their letter to us) at the then ruling rate of 61.516 4 to the

dollar, a difference of Kshs.28.0164 per dollar from our base rate of Shs.33/50.

Under the circumstances we find ourselves with no other alternative but to very reluctantly ask your company to reimburse us the loss suffered of Kshs.16,463,491.20 (i.e. 45 $ 587,634.64X61.5164 less US$ 587,637.64X33/50) as per agreement between the two companies."

The appellant responded to that letter of 29th March, 1993 by its letter of 13th July, 1993 as follows:

"We acknowledge receipt of your letter dated 25th June, 1993. We have considered the contents of your letter dated 29th March, 1993 setting out a claim resulting from currency fluctuations and regret to advise that we are not liable to paying any further sums to you. Your claim is rejected as the c ontract between us was not subject to currency fluctuations as alleged."

The matter ended up in court and the superior court (Rimita, J) found that the issue of foreign exchange was of major concern to the parties and that it must have been discussed verbally by the parties before the fax message of 4th August, 1992 (already referred to by us earlier) was sent. The learned Judge went on to say that the appellant accepted the fluctuation clause in the contract and that that clause formed an integral part of the contract. The learned Judge found for the respondent which finding has provoked this appeal.

By the first six grounds of appeal the appellant complains primarily that the learned Judge erred in incorporating into the contract between the parties a currency fluctuation clause when, according to the appellant, the applicability of that clause was sought to be and was specifically ousted. It is trite that in deciding what was exactly agreed between the parties correspondence prior to the formation of the contract is not to be looked at unless for ascertaining clarification of an ambiguity. When parties negotiate with a view to making a contract, many preliminary communications may pass between them before a definite offer is made. There can be no doubt that the fax message of 4th August, 1992 was only a quotation; it was merely a statement as to price, quantity of goods and payment. True it mentioned exchange rate of Kenya Shillings as against U.S. Dollar. But that quotation was not accepted.

There were discussions. The respondent offered to sell the fertilizer at a price of Shs.604/75 per 50 kilogramme bag ex-factory, at Nakuru stating other conditions would remain the same. The appellant accepted the new offer to sell it 2000 Metric tonnes of fertilizer at Sh.604/75 per 50 Kg. bag. Nowhere in the accepted offer, which resulted into the contract, did the appellant accept a fluctuation clause. This becomes even clearer when the respondent, for the first time, by its letter of 29th March, 1993 sought, reluctantly, payment of Shs.16,463,491/20 being the difference it had to pay to its bankers to pay in U.S. Dollars to its supplier. It is also clear that the appellant was interested only in a Kenya Shilling contract. There is no feature of the contract which could import into it a fluctuations clause.

The evidence of Mr. Daniel Munyoki Ngunja (PW1), the finance director of the respondent is clear. In cross-examination he said:

"There was no fluctuations clause. The fluctuation was gradual. We w ere paid money on 25.1.93. I do not know what the exchange rate was. There was a service problem with foreign exchange. The product was for B.A.T."

It is clear that the respondent was paid the full amount it was owed by 10th February, 1993. It is also clear that the respondent did not remit the money to its bankers by that date. It was confirmed by a representative of the respondent's banker, one Philip Kipuruki Arap Bar (PW2). He said and we quote.

"On 17th February, 1993, we did not pay because t he plaintiff had no money. But we had to buy dollars. We did not discuss the L.C."

As can be seen we have reconsidered and re-evaluated the evidence that was before the learned Judge and the only conclusion we can come to is that the appellant had made it very clear that it did not want to incorporate the currency fluctuation clause in the contract. It said so. The facts relating to the contract do not import into the contract such a clause as envisioned by the learned Judge who erred, fundamentally,in not appreciating the basic ingredients of a contract, that is, offer and acceptance. He erred by incorporating discussions and intentions of the parties into a contract that was fully spelt out in writing. The fax message of 4th August, 1992 was only an invitation to treat but the learned Judge relied on it to spell out a concluded contract.

There is however another issue raised and that is that the learned Judge erred in finding that the exchange rate of U.S. Dollar had risen to Kshs.61.5764 at the material time when in fact there was no evidence upon which such finding could be made. We have pointed out that the respondent's own witness (PW1) did not know what the exchange rate was on 17th February, 1993. We have also pointed out that by that date although the respondent had the money to pay its bankers it did not do so. In these circumstances, even if assuming there was a fluctuation clause in the contract, there is no evidence as regards the value of Kenya Shilling as against the U.S. Dollar which could have enabled the learned judge to arrive at the conclusion he did. It is for a party stating its case to prove it. The onus was on the respondent to show what was the value of the shilling against the dollar on 17th February, 1993.

Mr. Njuguna placed reliance on the case of Ghulam Kadir vs. B.O.E.C. [1957] E.A. 131 in support of the learned Judge's findings. In that case the contract itself contained the term "subject to fluctuation and increase in freight and insurance rates." The predecessor of this Court held that the words "subject to fluctuation" in the circumstances meant that the contract was dependent on the contract the sellers were making with their suppliers and if the latter raised their prices, a corresponding increase would be passed to the buyer, and that there was no element of uncertainty in a contract of that kind. In the instant case the appellant ab initio kept the fluctuations clause out. It wanted and got a Kenya shilling contract.

In the case of *Life Insurance Corporation of India vs. Valji [1968] E.A. 225* the issue was different. In that case it was held that the rate of exchange applicable was as at the date of maturity of the policy and not the date of payment. There was similar holding in the case of *Khaury vs. Khayat [1943] 2 ALL E.R. 406* . It was held therein that the rate of exchange to be applied was the date of maturity of the promissory note and not the date of payment. These cases do not help the respondent.

What we have said so far determines this appeal. We allow the appeal, set aside the judgment and decree of Rimita, J and substitute therefor an order dismissing the respondent's suit with costs. The appellant will also have the costs of the appeal.

Dated and delivered at Nairobi this 30th day of November, 2001.

R.O. KWACH

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JUDGE OF APPEAL

A.B. SHAH

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JUDGE OF APPEAL

M. OLE KEIWUA

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JUDGE OF APPEAL

I certify that this is
a true copy of the original.

DEPUTY REGISTRAR.