REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 834 of 2002

MOTEX KNITWEAR LIMITED…..……PLAINTIFF

VERSUS

GOPITEX KNITWEAR MILLS LIMITED……DEFENDANT

J U D G M E N T

The Plaintiff and the Defendant companies, through their directors, entered into a barter trade oral agreement, hereinafter the agreement, in which it was agreed that the Plaintiff Company could deliver to the Defendant various types of yarns, sheets, dusters, towels and dye stuff valued at Kshs.6,062,198/-, in exchange for weaving and textile machines. The Plaintiff delivered the items to the Defendant as particularized at paragraph 3 of the plaint, between 21st June, 1995 and 22nd June, 1995. The Defendant failed to meet its part of the bargain to deliver the machines to the Defendant. The Plaintiff then filed this suit against the Defendant Company on 8th July, 2002, seeking the return of the goods it delivered to the Defendant or in the alternative full compensation for the value of the goods in the sum of Kshs.6,062,198/- plus 18% VAT.

The Defendant filed its defence on 4th September, 2002. In paragraph 3 of the defence, the Defendant challenged the Plaintiff's suit for being bad in law for reason that the action was time barred under the Limitation of Actions Act. The Defendant also denied that the Plaintiff was entitled to the claim for reason that the goods were not fit for the Defendant's purpose and therefore consideration had failed; that there was no valuation and therefore the amount claimed was unrealistic and exaggerated. In the alternative the Defendant averred that the Plaintiff failed, refused or neglected to take possession of the weaving machines.

The Plaintiff called its Managing Director, Mr. Kamal, as its sole witness. In brief Mr. Kamal stated that after delivery of the goods to the Defendant on 21st and 22nd June 1995 the Defendant failed to deliver the machinery to the Plaintiff Company. Mr. Kamal stated that instead the machines were vandalized depreciating their value and that the Defendant declined to restore them to a serviceable state. That by a letter from its Advocates, Ramesh Manek, dated 10th September, 1998, the Defendant denied the Plaintiff's claim in paragraph 1 of that letter but in paragraph 2 asked the Plaintiff to collect its goods from the Defendant's premises. The Plaintiff's witness testified that he made several trips to the Defendant's premises to collect the goods but to no avail. That was when he filed the suit in court.

The Defendant did not call any witness. Both parties filed written submissions which I have considered.

Regarding the Defendant's option not to call witnesses, Mr. Nyawara for the Plaintiff submitted that it is trite that the effect of a Defendant not calling evidence to challenge a Plaintiff's testimony renders not only the Defence unsubstantiated but also leaves the Plaintiff's case unchallenged. Mr. Nyawara submitted that since the Defendant in this case opted not to call any evidence, that therefore makes the evidence tendered by Mr. Kamal Joshi for the Plaintiff unchallenged and the court has no alternative but to rely on it fully. For this preposition Counsel relied on the case of **AUTAR SINGH BAHRA AND ANOTHER VS. RAJU GOVINDJL, HCCC NO. 548 OF 1998** (unreported) where the Hon. Justice Mbaluto stated at page 4 paragraph 4 as follows:

"Although the Defendant has denied liability in an amended Defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the Defence rendered by the 1st Plaintiff in support of the Plaintiff's case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail."

I agree with this preposition of law and with the position given by the learned judge in the cited case.

The issues for determination are twofold, one whether the Plaintiff's claim is statute barred.

If the first issue is answered in the negative, the second issue is whether the Plaintiff has proved its claim against the Defendant.

On the issue of limitations it is the Defendant's contention that having filed the suit on 8th July, 2002 to recover a debt for goods supplied in 21st and 22nd June 1995, the suit was statute barred by virtue of section 4 of the Limitations of Actions Act, hereinafter the Act.

Section 4(1) of the Act provides:

"4. (1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued –

(a) actions founded on contract;

(b) actions to enforce a recognizance;

(c) actions to enforce an award;

(d) actions to recover a sum recoverable by virtue of written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture;

(e) actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law."

The Plaintiff's contention is that the cause of action did not arise until the Defendant made it clear in its letter of 10th September, 1998 that it had no intention of proceeding with the contract. The letter in question is P. exhibit 3 and was written by the Defendant's Advocate, Ramesh Manek, in response to a demand letter from the Plaintiff's Advocate dated 24th June, 1998. Ramesh Manek states in his letter thus:

"I act for Gopitex Knitwear Mills Limited and refer to your letter of 24th June, 1998, addressed to my client.

The claim for Shs.6,086,198/- or any other amount is denied and further I am instructed to address you as follows:

1. The dye stuff is lying in your go-down and was never supplied to my client.

2. The rest of the goods were supplied on the understanding that it was a barter for my clients weaving department together with other auxiliary machines showed to your Mr. K. B. Joshi. You now seem to have reneged on the said agreement, by reason of which my client has now repudiated the same and you may arrange to collect your said goods. Further, the value of the goods indicated in your said letter is rexaggerated (sic) and has not even the closest proximity to the actual value."

I have considered the rival arguments by counsels in this case. To determine whether the suit was debarred by statute on account of limitation, the court must determine when the Plaintiff's cause of action arose. Contrary to the argument by Ms. Wambui for the Defendant, the Plaintiff's cause of action is not the date when the oral barter agreement was entered into by the parties or the date when the Plaintiff delivered to the Defendant the goods which are the subject matter of the suit, all which happened in June 1995. The cause of action arose when it was clear that the Defendant had no intention of concluding the barter agreement by meeting its part of the bargain. It is not disputed by both parties that the Defendant through its Advocate, Ramesh Manek, wrote a letter to the Plaintiff's Advocate dated 10th September, 1998 in which it was made clear that the Defendant was no longer interested in concluding the agreement between the parties. In that letter the Defendant in very express terms stated that it had repudiated the barter agreement between the parties and asked the Plaintiff to arrange to collect the goods that it had delivered to the Defendant as part of the agreement.

The Plaintiff's evidence that its attempts to collect the machines from the Defendant in order to conclude the barter agreement was frustrated by the Defendant has not been controverted. The Plaintiff's evidence that upon repudiation of the barter agreement, the Defendant through its conduct demonstrated unwillingness to deliver to the Plaintiff the goods it had received from it was also not controverted. The Plaintiff's evidence is that through Kamal Joshi, it made several trips to collect its goods from the Defendant but none were delivered. That makes it very clear that the Plaintiff's cause of action arose on the date of the letter of 10th September, 1998 when it was clear to the Plaintiff that the Defendant was unwilling to either complete its part of the agreement or to restitute the goods or the value of the goods to the Plaintiff. As long as the agreement between the parties was subsisting the Plaintiff had no cause of action against the Defendant since there was no reason for the Plaintiff to file the suit against the Defendant. I say so because from the agreement the parties did not contract that time would be of essence.

Ms. Wambui and Mr. Nyawara disagree on whether the Defendant's letter of 10th September, 1998 was an acknowledgement of the debt or of the Plaintiff's claim. Ms. Wambui for the Defendant has argued that it was not an acknowledgment because they did not comply with the ingredients required under section 24 (1) of the Act. Section 24(1) of the Act stipulates (Limitations Act).

"24. (1) Every acknowledgment of the kind mentioned in section 23 must be in writing and signed by the person making it."

The above section must be read together with section 23(3) of the Act which stipulates:

"23. (3) Where a right of action, has accrued to recover a debt or other liquidated pecuniary claim, or a claim to movable property of a deceased person, and the person liable or accountable therefor acknowledges the claim or makes any payment in respect of it, the right accrues on and not before the date of the acknowledgment or the last payment;

Provided that a payment of a part of the rent or interest due at any time does not extend the period for claiming the remainder then due, but a payment of interest is treated as a payment in respect of the principal debt."

The Defendant's letter of 10th September, 1998 was written on behalf of the Defendant by its agent, the advocate, and signed by him. The letter is an acknowledgement that the Defendant is indebted to the Plaintiff. The words:

"The rest of the goods were supplied on the understanding that it was a barter for my clients weaving department together with other auxiliary machines showed to your Mr. K. B. Joshi. You now seem to have reneged on the said agreement, by reason of which my client has now repudiated the same and you may arrange to collect your said goods. Further, the value of the goods indicated in your said letter is rexaggerated (sic) and has not even the closest proximity to the actual value."

By asking the Plaintiff to collect goods from it as well as acknowledging that it did not deliver the machines as part of its obligation under the barter agreement, the Defendant was acknowledging that it was indebted to the Plaintiff. The acknowledgement by the Defendant that it had the Plaintiff's goods should be looked at in all the circumstances and the facts of the case. The Plaintiff has demonstrated that it delivered all the goods that it was obligated to deliver to the Defendant in exchange for the machines. The delivery notes to that effect were produced as exhibit 1 and were six in number. These deliveries have been admitted by the Defendant in paragraphs 6, 7 and 8 of the Statement of Defence.

In paragraph 1 of the letter of 10th September, 1998, the Defendant has stated that the dye stuff which the Plaintiff was supposed to deliver to it as part of the barter agreement was never delivered to the Defendant. The Defendant cites the failure to deliver the dye stuff as the reason to repudiate the contract. The averments contradicts the Defendant's statement of defence as no where in that defence has the Defendant pleaded that the dye stuff were never delivered. In any event the Plaintiff has shown in his evidence that it delivered the entire goods that it was mandated to deliver under the agreement. The dye stuff were part of the goods delivered as per the delivery notes Nos. 4584 and 4581 which were produced as exhibit 1. It is clear that the Defendant took delivery of the Plaintiff's goods in 1995. Having failed to fulfill its part of the bargain the Defendants became indebted to the Plaintiff for the value of the goods on the date it purported to repudiate the agreement.

In conclusion on this issue, and taking the totality of the evidence into consideration, the Defendant's letter of 10th September, 1998 was an acknowledgment that the Defendant was indebted to the Plaintiff for the goods delivered to it and or the value of the said goods. That letter meets the requirements of section 24(1) of the Act.

The Defendant has argued that even if the letter was an acknowledgment, it was not made to the person whose title or claim is being acknowledged, since the barter agreement was entered into between the Defendant and a company which is not the Plaintiff in the suit. That issue was put to the Plaintiff in cross-examination and the Plaintiff's response was that Kenya Knitwear Mills Limited which was addressed in the Defendant's letter of 10th September, 1998 was the parent company of the Plaintiff in the suit. I have perused through the defence and no where has the Defendant denied dealing with the Plaintiff

Company. The issue that the Plaintiff is not the proper party was not made an issue in the pleadings. It arose for the first time during the trial of the case. That being the case, I decline to make any determination on this point as it was never an issue for determination between the parties. The Defendant was satisfied from its pleadings that the Plaintiff was the party it entered into a barter agreement with, and therefore had *locus standi* to file this suit and it raised no issues, complaint or protest as to the locus of the Plaintiff Company. Raising it at this stage is an ambush and an afterthought which is unfair and cannot be allowed.

In conclusion I do find that the Plaintiff's claim as against the Defendant is not time barred and that the cause of action arose on the date of the letter of acknowledgment written to the Plaintiff by the Defendant dated 10th September, 1998. I am satisfied that the Plaintiff has proved its claim against the Defendant. The Plaintiff has proved that it delivered the goods pleaded in the plaint whose value it has given as Kshs.6,062,198/-. The Plaintiff has proved that the Defendant has neither released the said goods nor paid for their value. The Defendant is therefore indebted to the Plaintiff in the value of the same goods.

The Plaintiff claims value added tax (VAT) of 18%. I will not grant that claim as VAT can only be paid to the Government.

Having come to this conclusion, I enter judgment for the Plaintiff against the Defendant in the sum of Kshs.6,062,198/- together with interest on the said sum at court rates from the date of filing suit to the date of full payment.

The Plaintiff will also get the costs of this suit.

Dated at Nairobi, this 30th day of January, 2009.

LESIIT, J.

JUDGE

Read, signed and delivered, in the presence of:

Mr. Nyawara for the Plaintiff

Ms. Wambui for the Defendant

LESIIT, J.

JUDGE

Order: There be a stay of execution for 30 days.

LESIIT, J.

JUDGE