



**Superfoam Limited v Kimani t/a Sindi Bird Textiles & another (Civil Case 1 of 2022) [2024] KEHC 16687 (KLR) (18 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 16687 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KITALE  
CIVIL CASE 1 OF 2022  
AC MRIMA, J  
DECEMBER 18, 2024**

**BETWEEN**

**SUPERFOAM LIMITED ..... PLAINTIFF**

**AND**

**DAVID GATONYE KIMANI T/A SINDI BIRD TEXTILES ..... 1<sup>ST</sup> DEFENDANT**

**SINDI BIRD STORES LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**Introduction:**

1. Superfoam Limited, the Plaintiff herein, is a Limited Liability Company incorporated under the *Companies Act*. It has its registered office in Ruiru, Kiambu County. It is engaged in business of providing a diverse range of sleep solution products such as mattresses and pillows.
2. The Plaintiff instituted this suit on the basis of alleged contracts with the Defendants where it allegedly delivered its products. The suit was vehemently opposed by the 1<sup>st</sup> Defendant, David Gatonye Kimani t/a Sindi Bird Textiles. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants did not enter appearance and ex-parte judgments were entered against each of them. The suit was then heard on the part of the 1<sup>st</sup> Defendant thereby culminating with this judgment.

**The Plaintiff's case:**

3. Through the Plaint dated 28<sup>th</sup> January 2022, the Plaintiff asserted that on diverse dates between August 2020 and November 2021, David Gatonye Kimani t/a Sindi Bird Textiles, Sindi Bird Limited and Sindi Bird Stores Limited, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants herein respectively, sought supply of its products.



4. The Plaintiff pleaded that, in acceptance, it supplied and procured delivery of the products as per terms and conditions it advised the Defendants through its various delivery notes, invoices and Customer Master Data Form.
5. The Plaintiff pleaded that the Defendants made the representation that it would operate either in his personal capacity or under the auspices of Sindi Bird Limited or through Sindi Stores limited. It is its case that in affirmation to the foregoing, it presented documentation with the intention of procuring its trust for the supply and delivery of its products. The Plaintiff pleaded that the Defendant declared that the information in the Customer Master Data Form was correct and acknowledged that if the information was found to be misleading, the Plaintiff would be at liberty to cancel its indulgence.
6. The Plaintiff posited that it was an express or implied term of the agreement that the Plaintiff would ensure timely and simultaneous invoicing and delivery of its products on receipt of request to deliver. It also was its case that that the Defendant would confirm receipt of the its products as delivered by stamping its delivery notes and thereafter the payment of the invoiced amounts would become due payable within 30 days ('the payment period'). It was also pleaded that the agreements provided that any delay or default in payment of invoiced amount would attract an interest of 2% per month from the date of delivery to the date of full payment.
7. The Plaintiff pleaded that it supplied and delivered products to the Defendants but it failed to pay invoices worth Kshs. 23,541,284/- as at 2<sup>nd</sup> February 2021. It contended that in acknowledgment of the debt the Defendant made a settlement of Kshs. 814,330/- in partial settlement f the debt. The Plaintiff pleaded that it further invoiced the Defendant Kshs. 731,146/- thus bringing the sum of money owed to Kshs. 23,458,100/-.
8. The Plaintiff asserted that the Defendant then issued three credit notes for the sum of 25,442/- on 4<sup>th</sup> August 2021 and Kshs. 457,574/- and Kshs. 457,819/- both on 4<sup>th</sup> October 2021 thus bringing the owed sum of Kshs. 22,517,265/-. The Plaintiff pleaded further that the Defendant made a further partial payment of Kshs. 40,000/- on 14<sup>th</sup> October 2021 thereby bring down the original debt to Kshs. 22,477,265/-.
9. The Plaintiff further asserted that pursuant to the Customer Master Data Form, the Agreement and the terms of settlement as condensed in the invoices, it levied interest of 2% on the outstanding amounts for the period running from August 2020 to the end of the payment period, January 2022 which amounted to Kshs. 7,685,044/-Cumulatively, the Plaintiff pleaded that the amount it was owed was Kshs. 30,162,309.04/-, but in breach of the terms of the express and or implied terms the Defendants ignored, failed, neglected or refused to make payment.
10. Based on the foregoing factual background, the Plaintiff prayed for the following reliefs: -
  - a. Special damages at sum of the principal debt being Kshs. Twenty-two million four hundred and seventy seven thousand two hundred and sixty five. (Kshs. 22,477,265.00/-)
  - b. Interest accrued on the principal amount at the rate as prescribed herein amounting to Kshs. Seven million six hundred and eighty-Five thousand and forty-four and four cents (Kshs. 7,685,044.04/-)
  - c. Costs of this suit.
  - d. Interest on (a), (b) and (c) above at court rates, and
  - e. Any other relief that this honourable court may deem fit to grant.



11. The foregoing was affirmed by one JacklineKanyua Karimi the Plaintiff's Finance Officer who testified as PW1. It was her case that in 2018, the Defendant sought for supply of mattresses and allied items. To that end, the 1<sup>st</sup> Defendant opened an account and provided documents for Sindi Bird Textiles. She produced the documents listed in the list of documents as Plaintiff's Exhibits 1 to 15 inclusive. PW1 also stated that the Defendant's credit limit was Kshs. 1,500,000/- and the terms were cash on delivery. She further testified that the payment period was 30 days and they would generate invoices and delivery notes for any order and that the 1<sup>st</sup> Defendant would always sign delivery notes acknowledging receipt of goods. She further stated that the Defendant would at times issue post-dated cheques but for the period between August 2020 and November 2021, the cheques were variously dishonoured by the Bank. PW1 testified that the invoices had a clause that if payment was not made within 30 days an interest of 2% would set in on a monthly basis. As such, the Defendants' liability stood at Kshs. 30,162,309/-.
12. As for PW1, the 1<sup>st</sup> Defendant presented himself as the Director of Sindi Bird Textiles and they dealt with him as such. She, however, clarified that according its Customer Master Data Form, the Customer was Sindi Bird Ltd whose manager was one Magdalene Muthoni and that the 1<sup>st</sup> Defendant's name does not appear in the Customer Master Data Form.
13. On being referred to the Plaintiff's Know Your Customer (KYC) Form, PW1 confirmed that she did not know who signed it. She further conceded that according to its records Sindi Bird Ltd was its customer and that the Plaintiff did not obtain a Certificate of Incorporation from its customer neither was there a CR Form 12 that would confirm directorship. She alleged that the 1<sup>st</sup> Defendant did not provide any evidence of directorship of Sindi Bird Limited.
14. As regards the invoices, PW1 conceded that they neither bore any Sales Order numbers neither did they have any delivery addresses. She also admitted that there was no single order for delivery of any of its goods that was made by the 1<sup>st</sup> Defendant since all such requests were made by and demands addressed to Sindi Bird Limited. PW1 also clarified that the Plaintiff's driver and a turn boy would deliver the goods to Kitale and return the signed delivery notes and accompanied with the cheques. It was affirmed that none of the Plaintiff's sales representatives accompanied the vehicles to oversee the actual deliveries made.
15. According to PW1, some Delivery notes were signed by Sindi Bird Stores Ltd although none of the Invoices were issued to the said Sindi Bird Stores Ltd. She also stated that there was no single invoice in the name of Sindi Bird Ltd and no delivery notes were signed by Sindi Bird Ltd. She, however, stated that the two companies were one and the same because of the representation made by the 1<sup>st</sup> Defendant. It was PW1's further evidence that the dishonoured cheques were issued by Sindi Bird Stores Ltd. PW1 stated that the 1<sup>st</sup> Defendant did not issue any cheque for any of the invoices and deliveries made. PW1 confirmed that despite the challenges the Plaintiff had with the 1<sup>st</sup> Defendant, it still continued to supply the goods.
16. On the demand letters issued by the Plaintiff and its Advocates, PW1 stated that the same were issued to their client according to their records who was Sindi Bird Ltd. She confirmed that none of the Demand letters were addressed to the 1<sup>st</sup> Defendant.
17. PW1 also clarified that when she joined the Plaintiff, the arrangement between the parties herein was ongoing and orders would even be received by phone and acted upon accordingly. PW1 confirmed that according to the Customer Master Data Form, Magdalene Muthoni, was the Director of Sindi Bird Ltd and was the contact person.



18. The Plaintiff filed written submissions dated 8<sup>th</sup> March 2024. It was its case that as per the dictates of section 3 of the *Sale of Goods Act*, there existed a contract between it and the 1<sup>st</sup> Defendant. As regards the issue of interests, The Plaintiff urged the Court to find persuasion in *Eslon Plastics of (K) Limited -vs- National Water Conservation and Pipeline Corporation (2014) eKLR* where the Court observed that any interest rate agreed by parties should not be interfered with by Courts.
19. With the above, the Plaintiff urged this Court to allow the claim as presented.

**The 1<sup>st</sup> Defendant's case:**

20. David Gatonye Kimani T/A Sindi Birds Textile challenged the Plaintiff's claim through the Defence dated 22<sup>nd</sup> April 2022. He denied every allegation in the Plaint. It was his case that he neither traded in the name and brand of Sindi Textiles nor he traded in the name of the entities of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. He also denied being their principal or representative. The 1<sup>st</sup> Defendant further denied having sought or procured the supply of the Plaintiff's products during the period between August 2020 and November 2021. He denied invoices or delivery notes ever being directed to him.
21. The 1<sup>st</sup> Defendant further denied ever being a party to the Customer Master Data Form of 6<sup>th</sup> August 2018 and the contents thereof could not be the only basis for the supply of goods to the 1<sup>st</sup> Defendant. He affirmed that he had never been a party to the agreement the Plaintiff alluded and that he had never been supplied with goods worth 23,5421.282 and any other sum thereof. He further denied paying the sum of Kshs. 854,330/-.
22. He claimed that no liability accrued to him whatsoever for the alleged principal and interests thereon. The 1<sup>st</sup> Defendant pleaded that the Plaintiff's case was misdirected, that no demand letter was served upon him and that it be dismissed with costs.
23. The 1<sup>st</sup> Defendant, David Gatonye Kimani, solely testified. It was his evidence that he is a businessman in Kitale and trades in the name and style of David Gatonye Kimani and at time through his sister's name Esther Wairimu Gatonye. He adopted his statement as his evidence in chief.
24. Mr. Kimani was categorical that he was not in any way associated with Sindi Textiles, Simon Bird Ltd and Sindi Bird Stores Ltd and that he had never been supplied with any of the goods forming the claim in issue. He also denied making any payment to the Plaintiff in respect of its claim.
25. On cross-examination, Mr. Kimani stated that he neither had his National Identification Card in Court nor did he know Magdalene Muthoni. He also stated that he did not know his KRA PIN off-head.
26. He, however, admitted that he gave out his details to the Plaintiff including copies of his KRA PIN and ID Card since he had personally dealt with the Plaintiff in business and continues to do so to date. The witness stated that he was surprised that Magdalene Muthoni allegedly used his details to obtain good from the Plaintiff. According to Mr. Kimani, the said Magdalene Muthoni may have been an imposter since she was not his agent.
27. In reference to the Customer Master Data Form, he stated that he was not aware of the form and was astonished that his KRA PIN was appended thereon. He, however, conceded that he had personally dealt with the Plaintiff and used to guarantee her sister obtain credit facilities from the Plaintiff, but on his part, he only traded in cash.
28. Mr. Kimani further stated that he only dealt with the Plaintiff through WhatsApp by liaising with one Nikun Josh, a representative of the Plaintiff. He contested ever issuing any cheque to the Plaintiff. He stated that the cheques in question were issued by Sindi Bird Limited and not him.



29. The 1<sup>st</sup> Defendant filed written submissions dated 25<sup>th</sup> April 2024. It was his case that there was no way the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, based on the decision in Salomon -vs- Salomon & Co. Ltd, could be identified as one entity. He submitted that the Plaintiff had failed to prove its case since all documentation indicated that their client was Sindi Bird Limited and not him. He urged for costs of the dismissed suit.

**The 2<sup>nd</sup> and 3<sup>rd</sup> Defendant's cases:**

30. As captured above, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants neither entered any appearances nor filed defences. Judgments were entered against each of them.

**Analysis:**

31. Having appreciated the parties' cases through their respective pleadings, evidence, submissions and decisions referred to, the following issues arise for determination: -

- i. Whether the 1<sup>st</sup> Defendant was supplied with goods as alleged by the Plaintiff on the basis of a contract.
- ii. Whether the 1<sup>st</sup> Defendant is affiliated with the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.
- iii. Depending on (i) & (ii) above, whether there was breach of the terms of the agreement thereby rendering the 1<sup>st</sup> Defendant liable.
- iv. Reliefs, if any.

32. The Court will now deal with the issues sequentially.

**(a) Whether the 1<sup>st</sup> Defendant was supplied with goods as alleged by the Plaintiff on the basis of a contract:**

33. From the outset, it must be understood that the 1<sup>st</sup> Defendant admitted dealing with the Plaintiff, but not in the manner as alleged by the Plaintiff. According to the 1<sup>st</sup> Defendant, he was a customer who bought goods from the Plaintiff only on cash basis and that he had stood surety for his sister whom the Plaintiff extended credit facilities to. The Plaintiff's version of their dealing is however different.

34. In such a scenario, this Court is to decide on whether there existed a contract or agreement implied or express, between the 1<sup>st</sup> Defendant and the Plaintiff. That is a factual issue which calls for proof.

35. Sections 107, 108 and 109 of the *Evidence Act*, therefore, come to play. They provide as follows, respectively: -

107. Whoever desires any court to give judgment as to any legal right or liability dependent on existence of facts which he asserts must prove that those facts exist.
108. The burden of proving any fact necessary to be proved in order to enable any person to give evidence of any other fact is on the person who wishes to give such evidence.
109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.



36. The Plaintiff claimed the existence of an implied or express contract based on the delivery notes, invoices, Customer Master Data Form and Know Your Customer Form in respect of the goods supplied.
37. The 1<sup>st</sup> Defendant dissociated himself with the name Sindi Bird Textiles. He expressly denied trading in such entity. He also denied knowing the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents. It was his case that he only traded in his own name. The 1<sup>st</sup> Defendant further claimed that he was not supplied goods by the Plaintiff during the period in question and he denied owing any monies to the Plaintiff and that he was not a party to any of the documents relied upon by the Plaintiff.
38. A scrutiny of the documents in issue now follows.
39. The Know Your Customer Form is dated 6<sup>th</sup> August 2018. The client's business name is Sindi Bird Limited, the 2<sup>nd</sup> Respondent herein and address is 1705 Kitale. In the said form, the contact person is registered as 'Magdalene Muthoni'. Her designation is 'Manager'. In the payment details, it is indicated 'COD' (cash on delivery) and the credit limit was set at Kshs. 1,500,000/-.
40. The Customer Master Data Form was filled by one 'Aswan' on 16<sup>th</sup> August 2018 and approved by one Vevel on the same date.
41. In the particulars section, the Full name of the Customer is filled as Sindi Bird Limited. Its legal status was captured as 'Company'. The permanent address was entered as 'Kibomet (Warehouse) Kapenguria Road, Namwanga Shopping Mall. The business trading address was captured as 'Sindi Bird Limited (Shop), Kitale Town Centre and its KRA PIN was registered as 'A003486XXXX'.
42. Yet again, in the KYC form, the contact details of the customer were Magdalene Muthoni of mobile No. 0720274XXXX.
43. Paragraph 20 of the KYC form is the due diligence section. It is entitled 'Copies of Customer Identification Documents'. The Plaintiff required that the customer to avail and attach certain crucial documents. As the customer was a Company (Sindi Bird Ltd), it was called upon to attach the company registration documents, List and Passport of authorised signatories, list of major shareholders and KRA PIN Certificates. There is no doubt the Plaintiff intended to take every step in safeguarding its operations by clearly ascertaining its customers. In this case, what did not come out clearly was whether all the required documents were availed. Therefore, since the legal documents in respect to the customer, Sindi Bird Limited, were not produced, this Court finds it a tall order to craft a nexus between the said Sindi Bird Limited and the 1<sup>st</sup> Defendant.
44. But what of the invoices and delivery notes produced in evidence? Despite the illegibility of some of its contents, the Customer's name and customer code remained Sindi Bird Limited and CL 1868 respectively in all the documents. Further, the Debit Notes were all addressed to the 2<sup>nd</sup> Respondent's and Magdalene and so was the Demand Letter dated 20/09/2021. Again, the said documents fall short of the expectation.
45. It is, therefore, the undisputed position that none of the documents produced and the evidence tendered as a whole tend to connect the 1<sup>st</sup> Defendant with the Plaintiff as business partners apart from what the 1<sup>st</sup> Defendant admitted. As a result, the Plaintiff neither discharged its evidential burden of proof to demonstrate that the 1<sup>st</sup> Defendant was its customer nor did it produce any evidence or documents confirming that it delivered any goods to the 1<sup>st</sup> Defendants whose payment remained unsettled.
46. Inevitably, therefore, the first issue herein is answered in the negative.



**b. Whether the 1<sup>st</sup> Defendant is affiliated with the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants:**

47. This issue emanated from the contention by the Plaintiff that the 1<sup>st</sup> Defendant operated in his personal capacity or under the guise of Sindi Bird Limited or through Sindi Stores limited. However, the 1<sup>st</sup> Defendant denied the allegation. It was its case that it did not have any knowledge or affiliation with the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.
48. Evidentially, the Plaintiff bore the burden of proof. It had the obligation to avail evidence drawing a link between the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.
49. Save from just pleading that the 1<sup>st</sup> Defendant was affiliated with the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, no such evidence was adduced before this Court.
50. The claim suffers a false start.

**b. Whether there was breach of the terms of the agreement rendering the 1<sup>st</sup> Defendant liable:**

51. The resolution of this issue depended on the finding on the first two issues. This Court has found that there was no contract or agreement, express or implied existed between the Plaintiff and the 1<sup>st</sup> Defendant. The Court has also found that the 1<sup>st</sup> Defendant was not affiliated to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.
52. In the premises, the issue of breach falls by the wayside.

**Disposition**

53. As I come to the end of this judgment, I wish to render my unreserved apologies to the parties in this matter for the delay in rendering this decision. The delay was occasioned by the fact that since my transfer from Nairobi, I have been handling matters from the Constitutional & Human Rights Division, Kitale and Kapenguria High Courts. Further, I was appointed as a Member of the Presidential Tribunal investigating the conduct of a Judge in March 2024 and later elected to the Judicial Service Commission thereby mostly being away from the station. Apologies galore.
54. In the end, the following final orders do hereby issue: -
  - a. The Plaintiff's claim against the 1<sup>st</sup> Defendant is hereby dismissed.
  - b. Costs to the 1<sup>st</sup> Defendant.Orders accordingly.

**DELIVERED, DATED AND SIGNED AT KITALE THIS 18<sup>TH</sup> DAY OF DECEMBER, 2024.**

**A. C. MRIMA**

**JUDGE**

**JUDGMENT DELIVERED IN OPEN COURT AND ALSO VIRTUALLY IN THE PRESENCE OF:**

No appearance of any of the parties despite notice.

Chemosop/Duke – Court Assistants.

