



**Misort Africa Limited v Principle Secretary, the National  
Treasury and Planning & another (Civil Suit 182 of 2019)  
[2022] KEHC 14371 (KLR) (Commercial and Tax) (21 October 2022) (Judgment)**

Neutral citation: [2022] KEHC 14371 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL SUIT 182 OF 2019  
A MABEYA, J  
OCTOBER 21, 2022**

**BETWEEN**

**MISORT AFRICA LIMITED ..... PLAINTIFF**

**AND**

**PRINCIPLE SECRETARY, THE NATIONAL TREASURY AND  
PLANNING ..... 1<sup>ST</sup> DEFENDANT**

**ATTORNEY GENERAL ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. The plaintiff commenced this suit against the defendants by a plaint dated July 25, 2019 seeking judgment against the 1<sup>st</sup> defendant for Kshs 235,683,000/=. Out of such sum, it sought interest at commercial rates on Kshs 221,606,400/- from February 7, 2018 and on Kshs 14,076,600/- from March 22, 2018.
2. The plaintiff's case is that on June 8, 2016, it entered into a contract with the 1<sup>st</sup> defendant for the supply of maintenance spares for air conditioning units in Herufi Treasury data centers. The contract sum was Kshs 504,710,200/-. On diverse dates, the plaintiff supplied and delivered the subject goods to the 1<sup>st</sup> defendant who acknowledged receipt thereof.
3. However, the 1<sup>st</sup> defendant settled only two invoices but failed to settle the remaining two invoices one dated February 7, 2018 for Kshs 221,606,400/= and March 22, 2018 for Kshs 14,076,600. It was stated that the demands for settlement were made to both defendants but no settlement was made.
4. The defendants filed a joint statement of defence dated August 30, 2019. It was contended by the defendants that, prior to the supply of maintenance spare contract there was a two year proposed



maintenance contract for split system Air conditioning between the plaintiff and the 1<sup>st</sup> defendant dated January 26, 2016 for a contractual sum of Kshs 86,3369,424/-. The defendants denied the plaintiffs assertions that it had performed its obligations as per the contract and blamed the plaintiff for delay in delivering the goods. They contended that the entire contractual sum had been paid for the goods received.

5. At the Mr Martin Ng'ang'a testified for the plaintiff as PW1. He adopted his witness statement as his evidence in chief and confirmed that the amount claimed was Kshs 235,683,000/-. He reiterated the plaintiff's claim as stated in the plaint and produced the plaintiff's bundle of documents as PExh1.
6. In cross examination, he stated that he was seeking for interest at commercial rates even though the same was not stipulated in the contract.
7. Mr Oloo testified for the defendant as DW1. He adopted his witness statement dated October 26, 2021 as his evidence in chief. The same was an admission of the plaintiffs claim. In cross examination, he admitted that an in house committee had looked into the matter and had recommended that the plaintiff be paid. He stated that the EACC were looking into the matter and the plaintiff would be paid depending on the outcome of the EACC as there might have been fraud involved.
8. The plaintiff filed submissions dated March 2, 2022. It was submitted that during trial the defendant raised a new issue that was not pleaded, to wit, that the subject matter of the suit had been referred to the EACC for investigation for fraud. Counsel submitted that the new issue raised was an afterthought as it had not been raised by the Internal committee and further the defendants failed to submit any evidence to support that allegation. It was further submitted by the plaintiff that interest ought to be paid as prayed as the 1<sup>st</sup> defendant had no reason to deny liability.
9. The defendant's submissions were dated September 7, 2022. It was submitted that the interest should not be paid as it was not provided for in the contract. It was further submitted that in the event the court awards interest then it should be at court rates and not commercial rates.
10. Having considered the pleadings, the evidence and submissions, the issue for determination is whether the plaintiff is entitled to the prayers sought in the plaint. The plaintiffs case is premised on the fact that the defendant failed to pay two invoices raised by the plaintiff after delivery of the goods. According to the plaintiff, it had performed its obligations under the contract and there was no reason for the 1<sup>st</sup> defendant to refuse to pay the remaining amount under the contract.
11. The defendants in the defence blamed the plaintiff for the delay in delivering of the goods and stated that the full contractual sum had been paid to the plaintiff.
12. It is not disputed that the plaintiff and the 1<sup>st</sup> defendant entered into a contract on 8/6/2016 for the supply of maintenance spares for air conditioning units in Herufi Treasury data centers. The defendants did not dispute that the plaintiff supplied the 1<sup>st</sup> defendant with the said goods as per the contract. The area of contention is whether the plaintiff is entitled to the amount raised in the invoices dated February 7, 2018 and March 22, 2018, respectively.
13. It is trite that contracts freely and voluntarily entered into should be honoured. The contract for the supply of maintenance spares for air conditioning was awarded to the plaintiff for a sum of Kshs 504,710,200/-. In the witness statement of DW1 which was adopted as his evidence in chief, the defendants confirmed that the goods were in fact delivered to the 1<sup>st</sup> defendant and that invoices for Kshs 221,606,400/- and Kshs 14,076,600/- had not been paid. He further testified that an inhouse contract review committee had recommended that the said sums be paid to the plaintiff.



14. From the evidence on record, it is clear that the plaintiff performed its part of the contract. The defendants however raised a new line of defence that there were allegations of fraud and that they were waiting for a report from the EACC before making the remaining payment. The defendants' allegation raised a factor that would vitiate the contract on the ground of fraud. This had not been pleaded leave alone proved to the required standard.

15. In *Vijay Morjaria v Nansingh Madhusingh Darbar & another* [2000] eKLR, Tunoi, JA (as he then was) stated: -

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

16. The allegation of fraud was raised DW1 in his testimony. However, the same had not been pleaded. Further, there was no evidence whatsoever to prove the allegation of fraud. In this regard, I find that there was no reason that would justify the 1<sup>st</sup> defendant's refusal to honour its part of the bargain.

17. The other issue is whether the plaintiff is entitled to the interest sought. The plaintiff prayed for interest at commercial rates with respect to the amount quoted in the invoices. The defendants submitted that since the contract did not contain a clause for payment of interest thus the same ought to be dismissed.

18. In *H Young & Company (EA) Limited v South Shore International Limited* [2015] eKLR, Ogola J observed that: -

“Still, even if we agree that interest was discussed to be payable, then how come parties did not agree on the rate of interest. Is it possible that the failure to agree on the rate of interest also means that no interest was indeed applicable?

It is not the duty of the court to write a contract for the parties, and therefore this court would be reluctant to read into the oral contract any terms which may appear contradictory to the terms of the said oral contract. However, it is the duty of this court to give efficacy to the intention of the parties to a contract without re-writing the contract. In my opinion, for the parties to approve a period within which payments had to be made carries with it the implied term that if payment was not made within the prescribed period, some penalties would ensue, and in terms of a commercial transaction such as this, such penalty for late payment can only ensue in terms of interest. That there was no agreed rate of interest stated does not lessen the impact of that position. Where parties have not agreed on applicable interest, the court has a wide discretion. In any event, to use the Plaintiff's own phrase “payment within a reasonable period” the interest payable can also be such reasonable rates that the parties probably had in mind but did not verbalize, and which the court can infer.”

19. Further, in *Ramji Ratma & Company Limited v Attorney General* [2020] eKLR, the court observed that: -

“The general rule is that, a party cannot charge interest if it is not provided for in the contract or unless the right to charge interest was agreed to when the deal was made as held in the case of; *King Road Paving and Land Scaping Inc v Plati* (2017), ONSC 557.



However, common law seeks to remedy a party who has suffered loss due to delayed payment, where there is no contractual clause on interest. Indeed, the courts have come to accept without requiring special proof that, a party who has been deprived of use of his or her capital for a period of time has suffered loss, as held in the case of; Thoroughbred Breeders Association v Price Waterhouse 2001 (4)SA 551 (SCA) and that in the normal cause of events, such a party will be compensated for his loss by an award of mora interest.

...

Taking into account the undisputed fact of inordinate delay herein in payment of certificates in favour of the Plaintiff, it is only in the interest of justice and in accordance with custom and trade practice and/or principles of fair bargain, that the Plaintiff be awarded mora interest.”

20. In the present case, the plaintiff claimed interest on the basis of delayed payment of the two invoices from the date they were issued. It is not disputed that the contract did not stipulate that interest was payable in the event of breach or delayed payments. The contract provided that payment would be made upon delivery and acceptance of the goods by the client.
21. Ordinarily, in the ordinary cause of commercial dealings, merchants expect returns on their investment within a reasonable time. Goods must be paid for expeditiously once delivered. This is so when especially such goods are obtained through financing. In this regard, where a party is kept away from his money, he is entitled to compensation by way of interest. If no rate is agreed upon, the same would be at court rate.
22. Accordingly, I find that the plaintiff is entitled to interest for the delayed payments. However, the interest shall be from the date of the suit and at court rate.
23. In the upshot, I find that the plaintiff has proved its case on a balance of probability and enter judgment in its favor as against the 1<sup>st</sup> defendant as follows: -
  - a. The total sum of Kshs 235,683,000/- together with interest thereon at court rate from the date of filing the suit until payment in full.
  - b. Costs of the suit be borne by the 1<sup>st</sup> defendant.

It is so decreed.

**DATE AND DELIVERED AT NAIROBI THIS 21ST DAY OF OCTOBER, 2022.**

**A. MABEYA, FCI Arb**

**JUDGE**

