REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL, COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO. 190 OF 2005

RELIABLE ELECTRICAL ENGINEERING .....PLAINTIFF

VERSUS

MANTRAC KENYA LIMITED.....DEFENDANT

JUDGMENT

1. On or about the 27th September 2004 the Plaintiff won a tender to supply to Kenya Ports Authority (KPA) three 500 KVA sound proof generator sets by October 2006. By a contract in writing by exchange of correspondence between the Plaintiff and the Defendant in late 2004 and early 2005 the Defendant agreed to sell and the Plaintiff agreed to purchase the said generators, which were to be those manufactured by Caterpillar Company Limited. Consequently, the Defendant placed an order for the supply of those generators from a manufacturer in England. It was agreed that they were to be supplied in or about April or May 2005 but there was some delay caused by a mistake on the part of the manufacturers and that appears to have been resolved and is not an issue at the moment. The Plaintiff complains that though it has paid in full the agreed purchase price for the four generator sets the Defendant has supplied and installed only two 500 KVA sets and refused and/or has failed to deliver the remaining two sets, one of 500 KVA capacity and the other of 350 KVA. The Plaintiff has therefore sued the Defendant for *inter alia* specific performance of the contract.

2. The Plaintiff moved the Court under Order 39 Rules 1, 2 and 9 of the Civil Procedure Rules for orders *inter alia*, ***'that the Defendant either by itself, servants, agents, associates or otherwise howsoever be ordered to deliver the said generators to the Plaintiff forthwith and have them installed at the site as agreed.'***

3. By a ruling delivered on the 31.3.2006, the Court held that the Plaintiff had made out a prima facie case for the grant of an interlocutory mandatory injunction and ordered the delivery of the remaining undelivered generator sets on condition that the Plaintiff deposits the sum of **US $ 44,334**, being the disputed sum between the parties and accounting for the alleged error by the defendant, in an interest bearing account in the joint names of the advocates for the parties.

4. On 7.12.2006, the parties by consent recorded a consent judgment in favour of the Defendant in terms of the counter-claim against the Plaintiff for Euros. 77,653.38 together with costs and interest. The claim for USD 44,334 remained to await the outcome of the suit after hearing.

5. The plaintiff filed a Re Amended Plaint dated 14.12.2017, in which it is pleaded that since filling the suit, it had incurred loss and damages in the sum of **Kshs 4,907,080** as a result of the Defendant's failure to deliver the generator sets on the site and install the same. The plaintiff contends that that failure constituted a breach of the court order issued on 31.3.2006. On those pleaded facts, the Plaintiff sought the following orders:

a. Judgment for specific performance by the Defendant of the contract to sell and deliver the said generator sets bearing No.s EG 4C 00683 and JG4C 00691 to the Plaintiff and install and commission the same as agreed under the contract and damages as herein before set out.

b. Damages for detention of the said generators set until the same are delivered to the Plaintiff.

c. An indemnity in respect of damages if any payable by the Plaintiff to KPA in respect of any late delivery or late completion of the work under the Plaintiff's contract with the Defendant.

d. Costs of incidental of these proceedings and any other relief which this Honourable Court deems fit to grant.

e. Interest on special damages aforesaid.

6. When served with the Re-Amended plaint, the Defendant filed a Re-amended statement of defence and Counterclaim on 15.3.2018 admitting paragraphs 1, 2, 3 & 4 of the Re- amended Plaint. However, the Defendant stated that payment had not been made as agreed and therefore, the Plaintiff is not entitled to damages set out at paragraph 6 A (a) to 6(A) (e) of the Amended Plaint.

7. The Defendant further denied that the Plaintiff was entitled to the claim pleaded as Kshs. 1,165,550/=, ***(sic)*** Kshs. 4,907,080/= on account of the alleged time lost and delay caused in the delivery of the generators as set out at paragraph 6B of the amended Plaint.

8. In its counterclaim, the Defendant claims retained the sum of **77, 679.21 Euros** as well as the sum of USD 44,334 which it pleads to have arisen from "An error in the price that was quoted by the Plaintiff; the price list setting out the correct prices of generators being Euro 60,515 for 350 KVA capacity generators and Euro 86,098 for a 500KVA generator was sent by e-mail to the Plaintiff by the Defendant on 18th March 2004; the price were reduced at the Plaintiff's request made on telephone by **Monaj Shah** to **Stanley Gitau** on 10th December 2004 to USD 43,700 for the 350 KVA capacity generators and USD 66,150 for the 500 KVA capacity generators and when the prices were converted to Euros there was an error in that the 350 KVA generator was said to cost Euro 23,375 while three 500 KVA capacity generators were said to cost Euros 107,883.

9. Both parties filed a witness each and list of documents and pursuant to the directions by the court dated 14.11.2016 called only the witnesses who had filed the statements to give evidence based on such statements. The Plaintiff called its director, **Mohamed Ali Salim, as PW1,** while the Defendant, on its part, relied on the evidence of its former employee **Mr. Stanley Gitau**. All the witness relied on and adopted their respective witness statements as evidence in chief and then produced the Bundles of Documents filed as exhibits.

Plaintiff's evidence in support of the case

10. The hearing of the suit commenced on the 29.11.2018. On that day **PW1** testified and stated that the quotation given to them included installation and testing. However, two generators were delivered and not installed. Another company had to be sub-contracted to do the installation. Thereafter, the Plaintiff collected the remaining generators from Nairobi, incurring the cost of loading, transportation to Mombasa all totaling in the sum of Kshs. 4,907,080/=. The witness added that the Plaintiff paid in full the Defendant's quote in US$ but after 8 months, the Defendant stated that the quotation in US$ was in error as the prices had to be in Euros. On that change, the Plaintiff asserted having paid the difference from dollars to EURO in five installments from 8.12.2006, and the last installment was made on 9.3.2007. Interest on the aforesaid amounting to 5,000 Euros was paid in five tranches of 2,000 Euros on 21.3.2016 and 1,000 Euros on 4.5.2016, 20.6.2016 and 20.7.2016.

11. In cross-examination by **Mr. Owiti** Learned Counsel for the Defendant, PW1 confirmed that there was an agreement by quotations followed by L.P.O's and at pages 1- 7 of the Defendant's bundle of document contains the quotation and at page 8-10 a price summary is indicated. PW1 further confirmed that in a quotation dated 6.12.2014, installation materials and labour were not included. He further confirmed that they collected the two generators from Nairobi before Judgment was entered and that the documents enumerated at No. 1 -264 do not have any documents to support the claims at paragraph 6A of the Re-Amended Plaint. He then added that there are no documentations to prove the sums claimed 6B. On delays, PW 1 confirmed that there was communication on delay and reasons were given and there is a letter dated 16.6.2005 apologizing for the late delivery and an email of 15.7.2005 apologizing for late delivery and delay.

12. PW1 stated that the generators were standard generators and not special ordered generators and further that the letter dated 25.11.2004 from Kenya Port's Authority was not a complaint against late delivery and there is no complaint that was ever made by the Plaintiff.

13. On re- examination, PW1 stated that the quotations by the Defendant were in dollars, and that there was a letter dated 30.11.2005 complaining about delay in delivery. PW1 also stated that the second quotation was instigated by the dip on the exchange rate between the dollar and Euro.

14. For the defendant, STANLEY GITAU, DW1 testified and stated that he was the Defendant's power systems manager and that the Plaintiff had initially requested for 5 generators which were coming from United Kingdom, and a quote generated as per page1-10 of the Defendant's bundle of documents. However, the request was amended for supply of only 4 generators and as a result, a revised quotation contained at pages 11-15 of the Defendant's bundle was issued and excluded the duty to deliver on site and install the generators. The quotation was accepted by the plaintiff by a letter dated 7.12.2004 without any questions or reservation on the labour and installation costs.

15. After the Defendant supplied two of the generators, a mistake was detected in the use of an exchange rate of 149 instead of 104 which in effect would mean selling the generators below cost and no profit would be made. A meeting was arranged with the Plaintiff's representative, one Mr Manoj, who promised to discuss the matter with the plaintiff's management and revert to the defendants in writing but no written communication came forth.

Defendant's evidence in the case

16. DW1, STANLEY GITAU, confirmed the dealing and contract between the parties and stated that after 7.12.2004, when they received the orders from the plaintiff, the manufacture could not accept the order until the New Year and that there was a bombing incident in London and movement of goods slowed down. DW1 then added that the manufacturer made an error by manufacturing and delivering generators without canopies leading to a delay which was adequately explained to the Plaintiff and the explanation accepted.

17. On cross-examination, DW1 confirmed that the first quotation included supply delivery and installation, and by the time the revised quotation was being sent there had not been any delivery since the 1st two generators were delivered on 10.8.2005 or thereabout. Therefore, there was acceptance of the second quotation.

18. DW1 confirmed that the generators were to come from Belgium according to the commercial invoice found at page 28 of the Defendant's bundle of documents, and they were to pay the supplier in US. Further, that vide email dated 29.3.2005, **Mr. Manoj** complained about the delay on delivery and DW1 confirmed that the agreement between KPA and the Plaintiff was that delay would attract liquidated damages of Euros. 5000 per week.

19. In re-examination, DW1 stated that the Defendant had tabulated the loss arising from the Plaintiff delay at page 29 of the Defendant's bundle of documents. He also stated that although the commercial invoice says the country of supply was Belgium, the country of origin was U.K and Belgium was just the port of loading, and that by the time, Plaintiff went for delivery in Nairobi, the deposit had been made and the Defendant did not deliver because they lacked trucks to deliver the two generators and therefore, they had to get such trucks.

20. On being questioned by the Court, DW1 stated that the loss claimed at page 29 of the Defendant's bundle of documents was made even before the suit was filed and the delivery of generators.

The parties' submissions in support of their respective cases

21. The parties filed written submissions in support of their respective positions. On 6.10.2020, counsel for the parties attended Court and highlighted their submissions. **Miss. Omboga** Learned Counsel for the Plaintiff submitted that on 10.3.2006 the Court ordered the delivery of the two generators from Nairobi to Mombasa. However, the delivery to Mombasa was not made hence the Plaintiff incurred costs, which have been quantified and are sought as a natural consequence of the breach.

22. On the honest mistake alleged by the Defendant's employee, Counsel submitted that there was a provision of Euros. 5,000/= for currency fluctuation therefore the argument about a mistake is not accurate. **Miss Omboga** further submitted that delivery was expected at the end of March 2005 as per letter dated 26.1.2005, further, there was an email dated 14.3.2005 showing the consignment would be loaded for sail on 18.3.2005. On 29.3.2005, there was an email requesting for extension of time because of delay and on 17.6.2005 is when the Defendant wrote to inform the Plaintiff that wrong generators had been delivered contrary to the specification in the agreement.

23. **Miss. Omboga** further submitted that the issue of mistake came up in September 2005 when it was alleged that **Mr. Gitau** had made a mistake hence there was a clear breach of contract and the Plaintiff is thus entitled to the remedies sought in the amended Plaint.

24. **Mr. Mugambi** learned counsel for the Defendant submitted that the claim on the errors has been admitted and there is a consent Judgment of 7.12.2006. On quotations and delivery, counsel submitted that there was a review of the quotation and in the revised quotation the price of installation and currency fluctuation were removed, and there was an honest mistake by which a shortfall of US$44,334 was incurred, which the Plaintiff is estopped from challenging since vide e-mail dated 9.9.2005 the Plaintiff appreciated the mistake and promised to assist. Therefore, a Court of equity would not relieve a party for consequences of own mistakes provided it does not harm on the opposite side.

25. On delivery, counsel submitted that the first delivery was duly made but the delivery of the two other generators was withheld to await resolution of the dispute of the currency conversion and when the Plaintiff obtained an order of mandatory injunction compelling the release, the same was done by the plaintiff accepting and taking the consignment from Nairobi without affording the defendant an opportunity to deliver the two generators to Mombasa.

26. On breach of contract, the counsel for the defendant underscored there having been pleaded no particulars of the alleged breach of contract and asserted that no Judgment can be founded on no pleadings. On special damages, the counsel reiterated the position of the law that the same ought to have been not only pleaded specifically but also strictly proved. A position was taken that no evidence was led to prove the special damages claimed and therefore the same cannot be awarded.

27. On general damages, Counsel submitted that the same was not awardable unless the conduct of the Defendant was oppressive. There was no allegation nor proof of oppression to warrant the prayer for general damages. On indemnity, there is no evidence the KPA has made any claim against the Plaintiff and that all the explanation by the Defendant.

28. In rejoinder, Learned Counsel for the Plaintiff, on the issue of the email dated 9.9.2005, submitted that the letter dated 15.9.2005 contextualizes the dispute. Therefore, the Plaintiff never accepted the several mistakes by the Defendant and that the Plaintiff no longer claims indemnity from KPA claim.

Issues for determination

29. This Court notes that the issue of specific performance and the Defendant's counterclaim against the Plaintiff for Euro. 77653.38 are spent following the ruling by Justice (rtd) Maraga issued on 31.3.2006 and the consent judgment entered on 7.12.2006. I am of the considered view that the remaining issues for determination emerging from the remainder of the dispute are; whether the Plaintiff should be reimbursed for the costs incurred in transporting the two generators from Nairobi to Mombasa and the installation costs as special damages, and, whether the shortfall in the purchase price of the generators is payable to the Defendant's as prayed. In coming up with the two issues I have appreciated that the plaintiff indicated having abandoned his claim for indemnity against any claim by KPA and that the evidence show that the contract was completely performed after the last two generator sets were delivered.

Whether the Plaintiff should be reimbursed for the costs incurred in transporting the two generators from Nairobi to Mombasa and the installation costs as special damages?

30. As pleaded in the Re-Amended plaint in paragraph 6A and B, the claim is intended to be one for special damages. However, there was never any prayer for any specific sum. It might be one of those scenarios where counsel or litigant seeks to avoid payment of court fees by setting out the claim in the body of the plaint but without a prayer in that regard. That to this court is a practice that is evasive and casts a

litigant as not willing the requisite revenue to the government. I would disallow the claim on the basis that the plaint for not very good reasons failed to comply with the requirements of Order 4 Rule 2(1). But even on the merits, PW1 was unequivocal that it had availed no document to show how the sum claimed had been incurred. That to the court is a confirmation that there had not been strict proof of the damages pleaded as special damages. It remains the trite law that even when specifically pleaded and prayed for, special damages must also be strictly proved[1]. Here there was not even an attempt at proof by availing the evidence of costs incurred.

How about general damages?

31. As a general rule, general damages are not recoverable in cases of alleged breach of contract unless the exceptions to the general rule be met. See the Court of Appeal decisions in the decision in **Kenya Tourism Development Corporation Vs Sundowner Lodge Ltd 2018 Eklr** and **Consolata Anyango Ouma vs. South Nyanza Sugar Co. Ltd (2015)eKLR**

32. Here It was a term of the contract vide revised quotation dated 6.12.2004 that ***"the prices are delivered to site in KPA and commissioned."*** However, the Defendant did not make delivery to the site at KPA and was thus in breach of the terms of contract regarding delivery and commissioning. Having so found that the Defendant was in breached the contract by not delivery the two remaining generators to the site, I must now consider if the plaintiff is entitled to any remedy in law. That general damages is not, as a general rule awardable for breach of contract remain a general rule with exceptions and does not limit the courts power to award merited damages. The court of Appeal in the two cited cases at paragraph 30 reiterate that *restitution integrum* is always available just like minimal damages are. Applying the applicable principles, I do find that had the plaintiff availed evidence of he incurred costs, it would have been entitled to be reinstated to the extent of proved expenses. However, in the absence of proof the courts hands remain tied that it is the burden of the plaintiff to prove its case.

Whether the shortfall in the purchase price of the generators is payable to the Defendant?

33. The answer to this issue must be found in posing the question whether there was a mistake in generating the invoice and if such mistake was excusable.

34. when invoiced, the Plaintiff vide letter dated 7.1.2005 proposed its terms of payment of the goods evidenced in the quotation dated 6.12.2004 and the prices therein and by letter dated 26.1.2005, the Defendant confirmed that it had placed the order with its supplier in the UK for the agreed generator sets. There was a delay which was explained by the Defendant vide letter dated 14.3.2005 and vide email dated 29.3.2005, the Plaintiff expressed its frustrations because of the delay. On 30.3.2005, the Defendant apologized for the delay**.** When the generators arrived, vide letter dated 17.6.2005 confirmed that the same were delivered though without canopies. It was also stated that the manufacturer had accepted its error and was fast tracking the delivery of the 2 sets of the generators. The manufacturer even issued an apology to KPA for the inconveniences vide letter date 16.6.2005. Thereafter, two of the generators the 350KVA and 500KVA were delivered to the Plaintiff on 10.8.2005 and 12.8.2005 as per the delivery notes and received on the 14.8.2005 by KPA as contained in the Defendants bundle and the Plaintiff forwarded payments of Euro. 17915 being 30% the invoice amount of the 350 KVA generator and sets of postdated cheques for Euro. 29,859 being 50% of the invoice amount of the same generators as contained in the Defendant's bundle of document.

35**.** A second invoice was sent on 26.8.2005 for the Plaintiff to release 30% of the costs of the delivered generator sets and on the 29.8.2005 the Plaintiff made a payment of Euro. **26,028** being 30% of the balance of the invoice dated 26.8.2005.

36. Up to this late juncture when the contract had been substantially performed, there had not been raised any questions regarding the error in invoicing till the email dated 9.9.2005 came. In response to the said email, the Plaintiff's representative **Mr. Manoj Shah** via email written on the 9.9.2005 acknowledged the said error raised, and promised to send it to the Plaintiff's management for discussion. He also promised to help the Defendant in whichever way he could. However, on the 15.9.2005, the Plaintiff instructed the firm of **Atkinson Cleasby & Satchu** to demand for the two generators that were remaining in the Defendant's yard. It was further stated that the contract was already concluded and cannot be varied.

37**.** From the foregoing, I find that there was no meeting of minds between the parties on the issue of the raised error in conversion rate so as to estop the plaintiff from resisting the payment. Consequently, this Court has to determine whether the Defendant made a mistake on the conversion rate that caused a shortfall of US$ 44,334, and whether the said mistake can be remedied.

38. The authors of 6 ***Halsbury's Laws of England, 3rd Edition Paragraph 1670 of 2,*** state the law on the subject thus:-

> ***"Where there exists a real common intention between the two parties to a transaction, but mistake occurs in the expression of that intention, the court may correct the mistake in order to give effect to the real intention. To justify the court in so doing, it must appear that there has been a mistake common to both the contracting parties, and that the agreement purports to have been expressed in a deed or instrument in a manner contrary to the intention of both".***

39. Both in the common law and equity has availed relief to parties invoking it, either to declare a contract void or voidable. Lord Denning **in Solle v Butcher [1949] 2 All ER 1107 at page 1119: stated:**

> ***"Let me first consider mistakes which render a contract a nullity. All previous decisions on this subject must now be read in the light of Bell v. Lever Bros., Ltd. (14). The correct interpretation of that case, to my mind, is that once a contract has been made, that is to say, once the parties, whatever their inmost states of mind, have to all outward appearances agreed with sufficient certainty in the same terms on the same subject-matter, then the contract is good unless and until it is set aside for breach of some condition expressed or implied in it, is set aside or for fraud, or on some equitable ground. Neither party can rely on his own mistake to say it was a nullity from the beginning, no matter that it was a mistake which to his mind was fundamental, and no matter that the other party knew he was under a mistake. A fortiori if the other did not know of the mistake, but shared it...Let***

me next consider mistakes which render a contract voidable, that is, liable to be set aside on some equitable ground. While presupposing that a contract was good at law, or at any rate not void, the court of equity would often relieve a party from the consequences of his own mistake, so long as it could do so without injustice to third parties. The court had power to set aside the contract whenever it was of opinion that it was unconscientious for the other party to avail himself of the legal advantage which he had obtained. Torrance v. Bolton (19). This branch of equity has shown a progressive development. It is now clear that a contract will be set aside if the mistake of the one party has been induced by a material misrepresentation of the other, even though it was not fraudulent or fundamental, or if one party knowing that the other is mistaken about the terms of an offer, or the identity of the person by whom it is made, lets him remain under his delusion and conclude a contract on the mistaken terms instead of pointing out the mistake...A contract is also liable in equity to be set aside if the parties were under common misapprehension either as to facts or as to their relative and respective rights, provided that the misapprehension was fundamental and that the party seeking to set it aside was not himself at fault."

So that, equity will come to the aid of a party pleading mistake without distinguishing, as the common law did, whether it was one of fact or law, or that it was common, mutual or unilateral."

40. It is noteworthy that in this case, the parties are not interested in having the contract between them declared void because the same is practically and conclusively performed and it is only that the defendant alleges having detected a mistake of using an exchange rate of 149 to 1Euro instead of 104 to 1Euro, and it was confirmed that the quotation conversion rate was in dollars and not Euros. Consequently, it was the Defendant's evidence that it would suffer a loss of US$ 44.334. While the evidence by the Defendant on the exchange rate is uncontroverted I do not find that there was an honest mistake nor was the mistake common and mutual to the parties. Where the mistake is unilateral and the innocent party has acted on such mistake to the benefit of the party making the mistake, I find it unjust to call upon the innocent party back to the negotiating table. The Court of Appeal in **Savings And Loan Kenya Limited v Onyancha Bw'omote [2016] eKLR,** addressed such a scenario and stated:

" In our view, in the circumstances obtaining in this appeal, it would be inequitable and antithetical to fairness and justice to require the respondent to pay interest on the money in the second account, which has hitherto accrued on it. In the plaint before the High Court, the appellant pleaded in paragraph 4 that as at 11th May 1999 when the appellant advised that the balance in A/C 201-924-200 was KShs 301,494.98 (which the respondent paid) the second account No.201-896-188 had a balance of Shs.678,628.40. If the appellant had eschewed making the mistake it made, the liability of the respondent would not have escalated beyond the sum of Shs.678,628.40 as there is no evidence that the respondent would not have liquidated both loans in the two accounts. Equity demands that the appellant's mistake should not result in injury to the respondent. The appellant should not be treated as if its mistake has no consequences. It would be inequitable to require the respondent to pay interest that has accrued due on the loan beyond 31st May 1999, the date when the respondent liquidated the balance in the first loan account. We so find."

41. For the above reasons, and the fact that equity demands that a mistake should not result in an injury to the opposite party, I find that the Defendant is not entitled to the shortfall sum of US$ 44,334. If I was to award to the defendant the sum arising out of its mistake and well after substantial performance of the contract, it would be inequitable and unjust and be injurious to the plaintiff who has in any event been kept away from the monies deposited in an escrow account all this time due to the Defendant's mistake. I find that the defendant is not entitled to any sum over and above what it invoiced and was paid and therefore it cannot be entitled to the sums deposited in the escrow account together with the accrued interest thereon.

42. In summary, both the suit and the counter-claim fail but since pursuant to a court order issued herein there was money deposited, that sum is due to the plaintiff as the depositor together with any accrued interests so far. I have made this order in order that no subsequent application is invited to engage the court

43. Since no party has emerged outrightly successful, or in failure, I order that each party shall bear its costs.

DATED, SIGNED AND DELIVERED VIRTUALLY, BY MICROSOFT TEAMS, THIS 30TH DAY OF APRIL, 2021

PATRICK J O OTIENO

JUDGE