

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

CIVIL SUIT NO. 368 OF 2017

JAMES JUMA MUCHEMI & PARTNERS LIMITED.....PLAINTIFF

VERSUS

MILLING CORPORATION OF KENYA (K) LIMITED.....1ST DEFENDANT

MILLING CORPORATION OF KENYA (2009) LIMITED.....2ND DEFENDANT

JUDGMENT

BACKGROUND

The Plaintiff filed a Plaint against the Defendant dated and filed on **6th September 2017**. Through, Notice of Motion Application dated **18th February 2020**, the Plaintiff sought leave of the Court to amend the Plaint dated **6th September 2017**.

The Plaintiff filed its Amended Plaint dated **3rd May 2020** upon the grant of the orders seeking to amend its Plaint to include the 2nd Defendant in the Plaint. **On 8th June 2020**, the Court directed the Plaintiff to serve the Defendants with the Amended Plaint and the Defendants to enter appearance within 15 days as required.

The 2nd Defendant failed and/or refused to enter appearance within 15 days despite service of the Summons to enter appearance and the Plaintiff's pleadings. The Plaintiff filed for Request for Judgment against the 2nd Defendant dated **14th September 2020**.

On **23rd September 2020**, the 1st Defendant's Advocates filed the Memorandum of Appearance dated **23rd September 2020** entering appearance for the 2nd Defendant. However, the 2nd Defendant did not file a Statement of Defense. The Plaintiff proceeded to file Request for Judgment dated **14th September 2020** and the Court entered judgment in favor of the Plaintiff against the 2nd Defendant on **12th November 2020**. Thereafter, a formal proof hearing proceeded on **19th March 2021** when **PW1 Joyce Muchemi** testified on behalf of the Plaintiff. The Defendants were served with a Hearing Notice and an Affidavit of Service dated **19th March 2021** was filed to confirm the same.

The Plaintiff's claim is that it entered into an agreement with the Defendants for the supply of raw white maize. Pursuant to the agreement, the Defendants issued the Plaintiff with the following Local Purchase Orders (LPOs) amounting to **Kshs.45, 786, 123** namely:

a. LPO No. 3658 (27th January, 2015) for Kshs.12, 139, 376)

Defendant paid Ksh 5,691,633 and balance is Ksh 6,447,743

b. LPO No. 3666 (28th January, 2015) for Kshs.2, 775, 220)

Defendant paid Ksh 2,475,220 and balance is Ksh 300,000

c. LPO No. 3684 (18th January, 2015) for Kshs.17, 370, 477)

d. LPO No. 3693 (04th December, 2015) for Kshs.13, 504, 050)

The Plaintiff averred that the LPOs provided that the Plaintiff would supply and be paid the agreed purchase price of the maize supplied in 90 days upon delivery of the same. The agreed goods were to be delivered by the Plaintiff in 14 days from the date of any one/particular LPO failure of which the order for supply would be automatically cancelled.

It was the Plaintiff's claim that despite supplying the Defendants with the maize as specified in the LPOs and whereupon the Defendants acknowledged receipt thereof, the Defendants breached the terms of the supply agreements and failed to pay the entire sum due and owing to the Plaintiff as detailed below.

No.	LPO NO. (KSHS)	VALUE OF LPO (KSHS)	TOTAL AMOUNT PAID (KSHS)	BALANCE DUE & PAYABLE (KSHS)

3658 1. 27/01/2015	12, 139, 376	5, 691, 633	6, 447, 743
3666 2. 28/01/2015	2, 775, 220	2, 475, 220	300, 000
3684 3. 18/01/2015	17, 370, 477	0	17, 370, 477
3693 4. 04/12/2015	13, 504, 050	0	13, 504, 050
		TOTAL	37, 622, 270

The Plaintiff claimed that the Defendants admitted its indebtedness and in order to partially settle the claim the Defendants offered to transfer to the Plaintiff property namely **NAKURU/MUNICIPALITY/BLOCK 20/15**. However, the said property was already charged to a financial institution to secure lending facility to the Defendant.

The Plaintiff prays for judgment against the Defendants for:

- a. **Kshs.6, 481, 282** under **LPO No. 3658**, **Kshs.300, 000** under **LPO No. 3666**, **Kshs.17, 370, 477** under **LPO No.3684** and **Kshs.13, 504, 050** under **LPO No.3693** being unpaid balance of supplied goods;
- b. **Kshs.34, 848** arising from unpaid and/or returned cheques;
- c. General Damages; and
- d. Interest at the rate of 30% and cost of the suit.

STATEMENT OF DEFENCE

The 1st Defendant stated that it had been wrongly sued and denied that it entered into any agreement with the Plaintiff for the supply of raw maize.

The Defendant denied that the Plaintiff supplied it the quantity of the alleged goods on the diverse dates and further stated that the quantities of the goods had been overly exaggerated with the intention of reaping maximum profits from the alleged deliveries.

Further, the Defendant denied the Plaintiff's allegations that it had admitted its indebtedness and that it offered to partially settle the claim and denied that it offered to transfer to the Plaintiff its property namely **NAKURU/MUNICIPALITY/BLOCK 20/15**.

The Defendant denied that the demand and intention to sue was served and the jurisdiction of the court and prays that the suit be dismissed.

REPLY TO DEFENCE

The Plaintiff reiterated its averments in the Plaintiff and prayed that the Defendant's Statement of Defence be struck out with cost and judgment be entered as prayed in the Plaintiff.

HEARING

PW1, Joyce Muchemi testified on behalf of the Plaintiff. PW1 relied on the Witness Statement dated **6th September 2017**. While relying on the Witness Statement, PW1 testified by breaking down how the debt arose from each LPO, the amount paid by the 2nd Defendant and the balance due as outlined in the submissions hereunder.

The Plaintiff relied and referred to the bundle of documents annexed to the Plaintiff and identified the numbered LPOs 3684 (pg 85) 3693

(pg 134) 3658 (pg 23) 3666 (pg 77) and Pg 28-58 are copies of cheques at Pg 25 & 28 for replaced cheques. The Summary of deliveries part payments and outstanding amount due is at Pg88-89 of the bundle. Pg 90-108 are copies of bank advices for non -payment.

Pg 59-76,81-84 &109-133 are weighing tickets and Invoices.

PLAINTIFF'S SUBMISSIONS

The Plaintiff submitted that by dint of a commercial agreement the Plaintiff supplied the Defendant with raw white maize upon issuance of four Local Purchase Orders (LPOs) by the Defendant.

LPO No. 3658

On 27th January 2015, the 2nd Defendant issued LPO 3658 to the Plaintiff for the supply of 5,000 bags of maize at the rate of Kshs.2,350 per bag. The Defendants accepted the delivery of the maize totaling to Kshs.12,139,376. The Defendant issued various cheques several of which were cancelled and returned unpaid due to insufficient funds in the Defendant's accounts. The total amount paid for this LPO was Kshs.5,691,633 and the balance that remains unpaid is Kshs.6,447,743.

LPO No. 3666

On 28th May 2015, the 2nd Defendant issued LPO 3666 to the Plaintiff for the supply of 6,000 bags of maize at the rate of Kshs.3,000 per bag. The Defendant issued various cheques totaling to Kshs.2,775,220. However, as result of insufficient funds in the Defendant's accounts **Cheque No. 10877** dated 11th November 2015 amounting to Kshs.300,000 was cancelled by the Plaintiff's Bank. The total balance that remains unpaid is Kshs.300,000.

LPO No. 3684

On 18th August 2015, the 2nd Defendant issued LPO 3684 to the Plaintiff for the supply of 5,000 bags of maize at the rate of Kshs.2,700 per bag. The Defendants accepted the delivery of the maize and issued 66 cheques amounting to Kshs.17,370,477 which were all dishonoured and returned unpaid by the Bank. The total balance due that remains unpaid is Kshs.17,370,477.

LPO No. 3693

On 4th December 2015, the 2nd Defendant issued LPO 3658 to the Plaintiff for the supply of 5,000 bags of maize at the rate of Kshs.2,700 per bag. The Defendants accepted the delivery of the maize and the total amount due and payable is Kshs.13,504,050.

The total amount due from the LPOs was Kshs.37,622,270 and following various demands by the Plaintiff to the Defendants, the Defendants admitted liability and made a further payment of Kshs.9,144,725 leaving a balance of Kshs.28,477,545. The Plaintiff also suffered loss as a result of the unpaid cheques issued by the Defendant amounting to Kshs.34,848.

Further, the Plaintiff submitted that it is entitled to interest as claimed. **Section 26 of the Civil Procedure Act** vests the Court with discretionary power to award interest on pecuniary judgments. The section reads; -

Where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit.

The Plaintiff relied on the case of **Omega Enterprises Kenya Limited –versus- Eldoret Sirikwa Hotel Limited & Others Civil Appeal No.235 of 2001** as cited in **Magic Chemicals Inc. –versus- Prapid Enterprises Limited (E.A) Limited [2016] eKLR** where the court stated; -

"There is no doubt that if a party is deprived of the use of his money he must be compensated therefore by an award of interest thereon from the date he was so deprived."

Accordingly, I would agree with the decision of Azangalala J (as he then was) in Nalinkumar M. Shah vs. Mumias Sugar Company Ltd [2010] eKLR that:

"...Kenyan courts have power at common law to award interest for late payment of debt or damages irrespective of whether or not there is an agreement between the parties and there is also no impediment to awarding compound interest for the late payment if circumstances justify the same and if such interest will serve the ends of justice. After all a commercial transaction deserves the same treatment whether and wherever it takes place."

DETERMINATION

The Court considered the pleadings and submissions filed by the Plaintiff. The Plaintiff's claim is that it entered into an agreement with the Defendant for the supply of raw white maize.

Pursuant to the agreement, the Defendant issued the Plaintiff with the following Local Purchase Orders (LPOs) amounting to Kshs.45,786,123. The total amount due from the LPOs was Kshs.37,622,270 and following various demands by the Plaintiff to the Defendants, the Defendants admitted liability and made a further payment of Kshs.9,144,725 leaving a balance of Kshs.28,477,545. The Plaintiff produced a bundle of documents which included a LPOs issued by the 2nd Defendant for the supply of the raw white maize.

The issues for determination are as follows; -

- a) Whether the Defendant filed and served the memorandum of appearance and Defence within the prescribed timelines.
- b) Whether judgment should be entered in favor of the Plaintiff against the 2nd Defendant.

Whether the Defendant filed and served the memorandum of appearance and Defence within the prescribed timelines.

As per **Order 6 Rule 1 and Order 7 Rule 1 of CPR 2010**, the 2nd Defendant entered appearance on **23rd September 2020**. Thereafter, the 2nd Defendant did not file a Statement of Defense. The Plaintiff proceeded to file Request for Judgment dated **14th September 2020** and the matter was set for formal proof hearing.

Douglas Mwanja Wambua, Process Server who filed Affidavit of Service on 18th March 2021 and confirmed service of Hearing Notice copy annexed of 19th March 2021. The 2nd Defendant and/or advocate did not attend proceedings.

Whether judgment should be entered in favor of the Plaintiff against the 2nd Defendant.

Order 36, Rule 1 of the Civil Procedure Rules makes provision for the entry of Summary judgment as follows;

(1) In all suits where a plaintiff seeks judgment for—

(a) a liquidated demand with or without interest; or

(b) the recovery of land, with or without a claim for rent or mesne profits, by a landlord from a tenant whose term has expired or been determined by notice to quit or been forfeited for non-payment of rent or for breach of covenant, or against persons claiming under such tenant or against a trespasser,

where the defendant has appeared but not filed a defense the plaintiff may apply for judgment for the amount claimed, or part thereof, and interest, or for recovery of the land and rent or mesne profits.

(2) The application shall be supported by an affidavit either of the plaintiff or of some other person who can swear positively to the facts verifying the cause of action and any amount claimed.

(3) Sufficient notice of the application shall be given to the defendant which notice shall in no case be less than seven days.

The Plaintiff prays for summary judgment against the Defendant for:

- a. *Kshs.6, 481, 282 under LPO No. 3658, Kshs.300, 000 under LPO No. 3666, Kshs.17, 370, 477 under LPO No.3684 and Kshs.13, 504, 050 under LPO No.3693 being unpaid balance of supplied goods;*
- b. *Kshs.34, 848 arising from unpaid and/or returned cheques;*
- c. *General Damages; and*
- d. *Interest at the rate of 30% and cost of the suit.*

Black's Law Dictionary, 10th Edition, Pg 301 defines a liquidated claim as follows:

“1. A claim for an amount previously agreed on by the parties or that can be precisely determined by operation of law or by the terms of the parties agreement.

2. A claim that has been determined in a judicial proceeding.”

In the case of **Cimbria East Africa Limited –versus- Kenya Power & Lighting Co. Limited [2017] eKLR** the Court held:

“A claim does not become a liquidated demand simply because it has been quantified. To qualify as liquidated demand, the amount must be shown to be either already ascertained or capable of being ascertained as a mere matter of arithmetic. I adopt the following definition of a debt or liquidated demand from THE SUPREME COURT PRACTICE (1985) VOLUME 1, at page 33; A liquidated demand is in the nature of debt, i.e a specific sum of money due and payable under or by virtue of a contract. Its amount must either be already ascertained or capable of being ascertained as a mere matter of arithmetic. If the ascertainment of a sum of money, even though it be specified or named as a definite figure, requires investigation beyond mere calculation, then the sum is not a „debt or liquidated demand? but constitutes „damages?”

In light of the above the Plaintiff's claim is for a liquidated claim and this sum arose from the 4 LPOs issued by the 2nd Defendant for the supply of raw white maize. The Plaintiff through the testimony of PW1 and its submissions has given in great detail how the amounts arose

on each LPO namely: the cost of each bag of maize plus the number of bags; the amount paid by the 2nd Defendant; and the amount outstanding on each LPO. The suit was undefended as the 2nd Defendant against whom the judgment was sought only filed a Memorandum of Appearance and failed to file a Defense.

In the case of *Firoz Jusab Sumar –versus- Patrick Amadi Onzere [2005] eKLR* the court stated;

“This application is expressed to be brought under Order 35 rule 1 sub rules (1) (b), (2) and (3) of the Civil Procedure Rules, which stipulates

1. (1) in all suits where a plaintiff seeks judgment for

(a) a liquidated demand with or without interest; or

(b) the recovery of land, with or without a claim for rent or mesne profit, by a landlord from a tenant whose term has expired or been determined by notice to quit or non-payment of rent or for breach of covenant or against persons claiming under such tenant or against a trespasser, where the defendant has appeared the plaintiff, may apply for judgment for the amount claimed or part thereof and interest, or for recovery of the land and rent or mesne profits. Clearly, judgment under this rule can only be entered where the claim is for a liquidated sum or where the claim relates to the recovery of land by a landlord from a tenant. In the present case the plaintiffs are seeking a declaratory order and general damages. Summary judgment cannot be entered for a declaration or general damages.”

DISPOSITION

1. The upshot of this is that summary judgment is entered for the Plaintiff as prayed except for general damages.
2. The Summary Judgment entered against the 2nd Defendant is as follows;
3. Kshs.6, 481, 282 under LPO No. 3658; Kshs.300, 000 under LPO No. 3666, Kshs.17, 370, 477 under LPO No.3684 and Kshs.13, 504, 050 under LPO No.3693 being unpaid balance of supplied goods;
4. Kshs.34, 848 arising from unpaid and/or returned cheques; and
5. Interest at 16% prevailing Commercial rate and cost of the suit.

DELIVERED SIGNED & DATED IN OPEN COURT ON 30TH JULY 2021. (VIRTUAL CONFERENCE DUE TO CORVID 19 PANDEMIC MEASURES RESTRICTING OPEN COURT OPERATIONS AS PER CHIEF JUSTICE DIRECTIONS OF 17TH APRIL 2020)

M.W. MUIGAI

JUDGE