



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL CASE NO. 728 OF 2000

ELECTROWATTS LIMITED.....PLAINTIFF

VERSUS

COUNTRYSIDE SUPPLIES LIMITED.....1ST DEFENDANT

JOHN MUTUTHO.....2ND DEFENDANT

JUDGMENT

PRELIMINARY

1. When trial of this matter was concluded parties were ordered to file their written submissions and present them to court on **17th December, 2019**. On that day only the plaintiff had filed its written submission. As I write this judgment, while on my annual leave I have not had the benefit of the 2nd defendant's submissions.
2. **ELECTROWATTS**, the plaintiff, filed this case against **COUNTRYSIDE SUPPLIES LIMITED** (countryside) the 1st defendant and **JOHN MUTUTHO** (Mututho) the 2nd defendant seeking judgment for **Ksh 1,674,620**. This claim relates to the plaintiff's supply of four generators to Countryside.
3. The plaintiff obtained summary judgment against Countryside on 27th September 2009 for Ksh 1,399,620 with interest at 21% p.a from 19th April 2000 to payment in full. It is not denied that the plaintiff has been unable to execute for that amount ever since that judgment was entered. It ought to be noted that Mututho was granted leave to defend this suit.
4. The trial of the claim against Mututho proceeded before me on 2nd December 2019. This Judgment therefore relates to that claim.
5. Before proceeding any further, I will state that I was unable to trace, in this court file the original and filed plaintiff and Mututho's defence. I did however find copies of those pleadings and I will proceed on the understanding that they were indeed filed.
6. The plaintiff through its managing director **Stephen Edward Elkington** stated in evidence that Mututho was introduced to Elkington by the managing director of Euro Bank. Thereafter Mututho approached Elkington and requested the plaintiff do supply him with generators. The plaintiff received an L.P.O (Local Purchase Order) from Countryside for supply of four generators.
7. The plaintiff after importing the generators supplied them as instructed by the L.P.O. Elkington stated that after that delivery no payment was made to the plaintiff and that a cheque issued to the plaintiff by Countryside was dishonoured on account of Countryside not having funds in its bank account.
8. Having failed to get payment Elkington reported a complaint with the Criminal Investigation Department (CID). The police subsequently arrested Mututho and on being arrested Mututho informed Elkington that he was expecting money and on pleading with Elkington to have the criminal charges withdrawn and on Mututho writing an undertaking to make payment, those criminal charges were withdrawn. Elkington stated that no payment was made by Mututho thereafter.
9. Mututho by his evidence stated that he should not be held liable because no contract existed or exists between him and the plaintiff. He also stated that the plaintiff should not be allowed to obtain another decree having already obtained a decree against Countryside. Mututho further said that the plaintiff criminalized a civil dispute by reporting to the police whereby he was arrested and forced to make the undertaking relied upon by the plaintiff. He denied having engaged in any acts of fraud, deceit or impropriety as alleged by the plaintiff. On being cross examined he accepted that he personally gave the plaintiff assurance of payment.

ANALYSIS

10. Mututho is Sued on the basis that he, in his personal capacity undertook to pay Countryside's debt. Mututho says he was under duress when he wrote the letter, having been arrested.

11. Mututho wrote two letters the first dated 20th January 1997 is addressed to the manager of Euro Bank Limited. It is written attention of Peter Fernades. This is its content:

“This is to authorize your good selves to pay M/S Electro-Watts A/c No 100080028 Kenya Shillings One Million Six Hundred and Seventy Four Thousand Six Hundred and Twenty Nine only Ksh 1,674,629 from any moneys received in my favour or M/s Highfields Pharmaceuticals particularly Kenyatta National Hospital payment as per our telephone conversation (Mututho/Peter) today 1.00a.m. This is irrevocable and do undertake not to channel funds coming my way through other Bank except yours.

signed

M.N. Mututho

12. The second letter, undated, was written using the letter head of Highfield Pharmaceuticals Limited by Mututho. It is in following terms:

“Dear Steve,

I spoke to Peter this morning and indicated that you might be passing by any time. Our client World Bank guarantees, and formal pabos (sic) on the same. This has been done today 21-02-97 and I am rushing up there to see whether I can now collect the cheque. I do not foresee any further delays from their part and Both KNH and the Bank have been very co-operative. Kindly allow us a few more days to review on Tuesday – when I expect the cheque to have been cleared if availed today.

Thank you.

John Mututho.

13. The plaintiff submitted, and I am inclined to agree with those submissions that Mututho is bound by the principle of promissory estoppel. Plaintiff relied on the case COMBE V COMBE 2 K.B (1950) where it was held:

“...where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the party who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relationship as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced, even though it is not supported in point of law by any consideration, but only by his word.

But this principle does not create any new cause or action where none existed before; so that, where a promise is made which is not supported by any consideration, the promise cannot bring an action.”

14. Although Mututho said that he wrote the above letters under duress, having listened to the testimony of the parties. I formed the opinion that rather Mututho wrote the letter in order to persuade the plaintiff to drop the criminal charges against him. Having achieved that the plaintiff said that Mututho failed to honour his undertaking. There is no reason, I find, why Mututho should not be held to account for his undertaking. The plaintiff has proved its case against Mututho on a balance of probability. I do however find that the plaintiff is only entitled to judgment as entered by Justice Hewett on 27th September 2000 when summary judgment was entered against Countryside. The plaintiff is entitled to costs of the suit.

CONCLUSION

15. In the end there shall be judgment jointly and severally against the 1st and 2nd defendants for **Ksh 1,399,620** with **interest at 21%** from **19th April, 2009** until payment in full. The defendants shall pay the plaintiff's costs of this suit.

DATED, SIGNED and DELIVERED at NAIROBI this 30th day of APRIL, 2020.

MARY KASANGO

JUDGE

ORDER

In view of the measures restricting court operations due to the **COVID-19 pandemic** and in light of the Gazette Notice No 3137 of 17th April 2020 and further parties having been notified of the virtual delivery of this decision, this decision is hereby virtually delivered this **30th day of April 2020**.

MARY KASANGO

JUDGE